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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1164

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ALFRED A. KNOPF, INC., VICTOR L. MARCHETTI, JOHN D. MARKS,
Petitioners,

—v.—

WILLIAM COLBY, as Director of Central Intelligence of the United States, and HENRY KISSINGER, as Secretary of State of the United States,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FLOYD ABRAMS
EUGENE R. SCHEIMAN
LORETTA PRESKA
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
Attorneys for:
Alfred A. Knopf, Inc.

MELVIN L. WULF
JOHN H. F. SHATTUCK
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016
Attorneys for:
Victor Marchetti and
John Marks

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In The

Supreme Court of the United States

October Term 1974

No. ___________

Alfred A. Knopf, Inc., Victor L. Marchetti,
John D. Marks,

Petitioners,

v.

William Colby, as Director of Central
Intelligence of the United States,
and Henry Kissinger, as Secretary of
State of the United States,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Fourth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on February 7, 1975.

Opinions Below

The opinions of the Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of Virginia are unreported. They are set out in the Appendix, *infra*., p. 1a and 19a, respectively. The opinion of the United States Court of Appeals for the Fourth Circuit in the predecessor case of *United States* v. *Marchetti* is reported at 466 F.2d 1309 (1972) and is set out in the Appendix, *infra*, p. 55a. The opinion of the United States District Court for the Eastern District of Virginia in *United States* v. *Marchetti* is unreported. It is set out in the Appendix, *infra*, p. 73a.

Jurisdiction

The judgment of the Court of Appeals was entered on February 7, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether an injunction which requires petitioner Marchetti, a former employee of the Central Intelligence Agency, "to submit to the Central Intelligence Agency, for examination 30 days in advance of release to any person or corporation, any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources and methods," which authorizes the Central Intelligence Agency to forbid disclosure of "information which is classified and which has not been placed in the public domain by prior disclosure," and which forbids petitioner from disclosing such information "in any manner", is a prior restraint forbidden by the First Amendment.

2. Whether Respondents may, consistently with the First Amendment, prohibit publication of classified

information in the absence of proof that its disclosure would "surely result in direct, immediate and irreparable injury to the Nation or its people."

3. Whether, under the First Amendment and the doctrine of the Separation of Powers, the Executive Branch has the authority to initiate, and the Judicial Branch the power to entertain and decide, the action for an injunction against petitioner Marchetti.

4. Whether the standards enunciated by the Court below for proving that information is classified and in the public domain, which results in the deletion of 168 passages from a published book, violates the First Amendment.

5. Whether the injunction in this case, which has resulted directly in the first act of official censorship by the United States in its history, violates the First Amendment rights of petitioner Alfred A. Knopf, Inc., a book publisher, insofar as it has prevented publication of the full manuscript of the book, the CIA and the Cult of Intelligence, written by petitioners Marchetti and Marks under contract.

STATEMENT OF THE CASE

Petitioner Victor L. Marchetti was employed by the Central Intelligence Agency in October 1955. He resigned in September 1969 having reached the grade of GS-15. During his employment he had held a variety of posts including that of Special Assistant to the Deputy Director.

On April 18, 1972, the United States initiated an action for injunctive relief against Marchetti. Without notice, the government filed an application for a temporary restraining order before the Hon. Albert V. Bryan, Jr., U.S.D.J., in the United States District Court for the Eastern District of Virginia. Judge Bryan issued a temporary restraining order ex parte. The

T.R.O. restrained the defendant from "disclosing in any manner . . . any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources or methods . . . without prior authorization from the Director of Central Intelligence . . ."

The complaint upon which the T.R.O. was issued alleged that the purpose of the action was to secure an order enjoining Mr. Marchetti "from breaching the terms and conditions of secrecy agreements entered into by defendant while he was an employee of the Central Intelligence Agency (hereinafter referred to as the Agency), which agreements constitute a contract between defendant and the Agency, by disclosing, publishing, or otherwise revealing certain intelligence information or other classified information relating to intelligence sources and methods, and to obtain an order requiring the defendant to submit to the Agency for examination certain writings, in advance of their release, to insure that the information contained therein is not classified in accordance with Executive Order 10501, or otherwise covered by the terms and conditions of the aforementioned secrecy agreements. . ." (para. 3).

The secrecy agreements relied upon by the goverment were signed by Marchetti on October 3, 1955, at the beginning of his employment with the CIA, and on September 2, 1969, upon termination of his employment. The agreements are set out in the opinion of the Court of Appeals, App., infra, pp. 57a-59a 1/

1/ The Court of Appeals held that only the first agreement was enforceable. The government has not complained of that conclusion. References to "App., infra, ______" are to the appendix to this Petition.

Upon filing the complaint and application for a T.R.O., the goverment filed as sealed exhibits an unpublished article drafted by Marchetti, the typescript of an outline for a book entitled "a concept for a book about the Central Intelligence Agency," written by Marchetti, and, *ex parte*, an affidavit of Thomas H. Karamessines, 2/ then a Deputy Director of the Central Intelligence Agency, "analyzing the aforementioned article and specifying, for this Court's consideration, those [six] instances in which the aforementioned article discloses currently classified intelligence sources and methods." (Affidavit of Richard Helms, Director of Central Intelligence, dated April 17, 1972.)

On Friday, April 21, 1972, Marchetti appeared in the District Court with counsel and moved to dissolve the temporary restraining order and for access to the plaintiff's sealed exhibits. In an affidavit accompanying the motion to dissolve, Marchetti said, among other things:

> My years of experience in the Agency have led me to believe that the CIA and United States intelligence have grown beyond the actual needs of the nation. There is a great deal of redundancy, waste and inefficiency in the intelligence business today, and many of the operations undertaken by the CIA and other intelligence agencies are counter productive and harmful to the nation. Such activities, unrelated to the national security, would not be tolerated by an informed public and an informed Congress.

2/ The article, the book outline, and the Karamessines affidavit are contained in Vol. III of the appendices filed with the court below. Voume III is classified secret.

Both the motion to dissolve and the motion for access to the sealed exhibits were denied. 3/

On April 28, 1972, the date set for hearing on the preliminary injunction, the defense reluctantly asked a two week adjournment because the need to obtain security clearance for prospective witnesses impeded preparation of the defense case. The T.R.O. was continued and the hearing was adjourned to May 15th at which time the hearings on the preliminary and final injunctions were to be merged. In the interim, both parties engaged in discovery.

Marchetti filed his answer on May 12th, asserting that the complaint failed to state a claim upon which relief could be granted, that 28 U.S.C. §1345 did not confer jurisdiction upon the court to grant injunctive

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3/ Marchetti of course had copies of his articles and the book-outline which he had given to his attorneys at their first meeting. The motion for access referred only to the Karamessines affidavit, which contained the heart of the government's case.

The government informed Marchetti on Monday, April 24, 1972, six days after securing the T.R.O., that he and one of his attorneys had been cleared for access and could examine the sealed exhibits. In the course of the next few days other attorneys were cleared. Prospective witnesses had to be cleared before counsel would tell them essentially what the case was about. The lawyers' secretaries needed clearance before they could type material which included classified information. Some parties were cleared within twenty-four hours. Others took two days or more. Two prospective witnesses were denied clearance. One of them, Prof. Richard Falk of Princeton, was ordered cleared by the district judge after a hearing.

relief, that the court lacked jurisdiction over the subject matter, and that the secrecy agreements and E.O. 10501 4/ were illegal and void because they violated the First Amendment and the due process clause of the Fifth Amendment.

The government's case at trial consisted principally of Mr. Karamessines testifying to the contents of his affidavit. On cross-examination the defense sought to have Mr. Karamessines specifically describe the reasons underlying and supporting the conclusions asserted in his affidavit concerning the effect that disclosure of the six events related in the unpublished magazine article would have upon the national security and defense. By sustaining the government's objections to most defense lines of cross-examination, the district judge rejected the defense's First Amendment theory of the case. That theory rested on the claim that no restraint could withstand the presumption against prior restraints inherent in the First Amendment unless the government could show that disclosure of the specific materials involved, in the words of Mr. Justice Stewart in New York Times v. United States, 403 U.S. 713, 730 (1971) [hereinafter The Pentagon Papers Case], would "surely result in direct, immediate and irreparable injury" to the United States or its people.

After its motion for a directed verdict was denied (A. III-141)5/ the defense called Mr. Marchetti to

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4/ E.O. 10501 is the Executive Order which established the system of classification and the procedures for treating classified information. It has been superseded by E.O. 11652 effective June 1, 1972. E.O. 10501 is set out in 3 C.F.R. 979 (1949-1953 Comp.); E.O. 11652 is at 3 C.F.R. 375 (Supp. 1973).

5/ References to "A.__" are to the appropriate volume and page of the appendices filed with the court below.

testify.[6] His testimony related principally to the objectives he hoped to achieve in writing and speaking about the Central Intelligence Agency.

Mr. Marchetti stated that he has been addressing his "criticism to the United States Intelligence Community in general, of which the CIA is only one organization" (A. III-143). That he believed it "has grown too large, too expensive; it has grown beyond the needs of the people of this country" (Ibid.). He also believed that Congress does not receive enough information about the work-product of the CIA and the intelligence community (A. III-143-144).

He stated further that he believed that the "CIA and to a lesser extent other United States Intelligence Agencies have involved themselves in certain activities which I think are questionable . . . [and] are being carried out without the advice and consent of Congress or even without their knowledge" (A. III-144-145). And he stated that "it is time that more information be made available in the hopes that eventually Congress will conduct a review of the intelligence community in order to carry out some reforms" (A. III-145).

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[6] The defense had planned to call four experts to testify in support of the claim that disclosure of the six events would not "surely result in direct, immediate and irreparable injury" to the United States or its people. Given the district court's rejection of that theory, outlines of the proposed testimony were put into the record as proffers.

It was and continues to be our claim that the government had not begun to approach the heavy burden required by The Pentagon Papers Case. The purpose of the proffered testimony was merely to nail down that claim.

He expressed the hope that "we may have a better organization and perhaps avoid the problems that have sometimes occurred in the past in other countries where secret organizations turn into . . . secret police-type organizations" (A. III-146).

Mr. Marchetti asserted that his experience within the CIA provides him with "some unique experience that allows me to make certain judgments that the ordinary citizen would not be able to make . . ." (Tr. 146). At the same time, he said, he believes "that I can make the main point, the main criticisms as to need for a greater direction and control, need for more economy and need for less indulgenece in covert action activities and the other criticisms and suggestions I have without providing any information that would be harmful to the national security" (A. III-148).

Mr. Marchetti also testified that, at that time, he had a contract with petitioner Knopf for publication of a non-fiction book concerning the CIA (A. III-149, 155, 157).

At the completion of Marchetti's examination and cross-examination, the district judge issued a preliminary injunction in the exact terms of the T.R.O. (A. III-178). On May 19th, he filed a memorandum opinion and order and issued a permanent injunction "identical in terms of the temporary restraining order heretofore entered."[7] The court held that "the contract [*i.e.*, the secrecy agreements] takes the case out of the scope of the First Amendment; and to the extent the First Amendment *is* involved, the contract constitutes a waiver of the defendant's rights thereunder. It is these documents that the Court feels distinguish this case from *New York Times* v. *United States*, 403 U.S. 713 (1971), and render it no more than a usual dispute between an employer and an employee regarding the revelation of information obtained by that employee during his employment. Consequently, there is no prior restraint and no such heavy burden on the United States to show irreparable damage to the country as was imposed by New York Times." App., infra, p. 80a.

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[7] App., *infra*, p. 82a.

Marchetti moved the Fourth Circuit for an expedited appeal and the case was set for oral argument on May 31st. More than three months later, the Fourth Circuit handed down its opinion, essentially affirming the decision of the district court but remanding "for the purpose of revising the order to limit its reach to classified information . . ." App., infra, p. 71a. The Court held that ". . . the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment." App., infra, p. 67a. The opinion acknowledged -- though only barely -- the existence of The Pentagon Papers Case, but failed to deal with the substance of that decision as it applied factually and conceptually to the case at bar. This Court denied certiorari, 409 U.S. 1063 (1972), three Justices dissenting.

On March 15, 1973, the district court issued an amended permanent injunction against Marchetti, based upon the Circuit Court's opinion, which is set out in the Appendix, infra, pp. 83a-85a. The injunction required, and continues to require Marchetti to submit to the CIA "any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources or methods"; and it authorizes the Director of Central Intelligence within thirty days to order deleted "any classified information relating to intelligence activities, [and] any classified information concerning intelligence sources and methods." It is further provided that the injunction shall apply only with respect to classified information obtained by said defendant by reason of his employment under the aforesaid secrecy agreement and which has not been placed in the public domain by prior disclosure by the United States. . ."8/

Thereafter, Marchetti, in collaboration with a co-author, petitioner John Marks, a former State Department employee (A. I-13, II-358), completed a manuscript of a book highly critical of various CIA activities entitled "The CIA and the Cult of Intelligence" (A. I-4).9/

On August 27, 1973, pursuant to the injunction, Marchetti submitted a 517 page manuscript of that book to the CIA (A. I-3, 4). On September 26, 1973, exactly 30 days after submission, the CIA delivered to Marchetti's counsel a nineteen page letter specifying 339 deletions (15-20% of the manuscript) to be made prior to release of the document (A. I-17-37). Later on September 26, 1973, Marchetti and Marks submitted to petitioner Knopf, his publisher, the censored version of their manuscript from which the specified deletions had been physically removed (A. I-4). On October 15, 1973, 49 days after submission, the CIA, after meeting with Marchetti and his attorney, agreed to release 114 of the original 339 deletions, thus continuing to assert the right to require that 225 portions of the manuscript

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8/ It is to be noted that while the second injunction issued by the District Court applies by its terms solely to "classified" information, anything whatsoever written by Marchetti concerning intelligence, whether fiction or non-fiction, is subject to an automatic 30 day prior restraint while the Director of Central Intelligence picks those items he determines are "classified".

9/ It was stipulated at the start of the trial that Marks would be bound by the ultimate determination be deleted (A. I-38-51). On February 5, 1974, more than 4 months after submission, the CIA delivered a letter releasing a further 29 of the remaining 225 deletions, and on February 27, 1974, exactly 5 months after submission and literally on the eve of trial, the CIA withdrew from its position as to 57 additional deletions -- leaving 168 at issue (A. II-17-18).

The instant suit was filed in the United States District Court for the Southern District of New York on October 31, 1973 by petitioners Marchetti, Marks and Knopf. On the government's motion, the case was ordered transferred to the Eastern District of Virginia on November 12, 1973 (A. I-71).

The present complaint sought restoration of the items ordered deleted by the CIA by putting into issue the question of whether such items were in fact "classified" as required by the terms of the injunction and by claiming that at least some items were in the public domain or had been learned outside the course of Marchetti's and Marks' employment.10/ To ensure reviewability here, the complaint also raised the following

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(Footnote continued from previous page.)

in this action as to freedom to publish or restriction on publication of the book in issue to the same extent as Marchetti and as though he, Marks, were a party to the injunction (A. I-110-111). The quid pro quo was discontinuance of the government's contersuit against Marks for the same perpetual injunction secured against Marchetti.

10/ As part of the stipulation referred to supra note 9, it was also agreed that the injunction covered information learned by Marks during the course of his employment at the Department of State.

claims 11/ which had been explicitly rejected in the first round of litigation by the courts below:

1) that censorship of the manuscript violated the First Amendment, and was a forbidden prior restraint, because "publication of the information contained in the deletions will not surely result in direct, immediate and irreparable injury to the Nation or its people";

2) that the secrecy agreements themselves violated the First and Fifth Amendments;

3) that the injunction violated the First Amendment and was void upon its face;

4) that there was no statutory authority to support the courts' jurisdiction in issuing the injunction.12/

11/ A. I-6-8.

12/ These issues were raised and preserved throughout trial and on appeal. Since the Fourth Circuit entertained (and rejected) the claims again in this second round of litigation (App., infra, p. 15a), they are properly before this Court. Even if they had not been entertained, they would not be res judicata in this Court. Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973); Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968); Mercer v. Theriot, 377 U.S. 152 (1964); Hamilton-Brown Shoe Co. v. Wolf Bros. and Co., 240 U.S. 251 (1916).

Trial was held on February 28, March 1, and March 4, 1974.[13/] As its witnesses, the government produced the four deputy directors of the CIA and, as a rebuttal witness, the Director of Central Intelligence, Respondent Colby. Cross-examination by the petitioners, bearing on either the "reasonableness" of classification decisions or whether publication of the full manuscript would surely result in direct, immediate and irreparable harm to the public, was objected to and said objections were sustained by the District Court on the basis of the prior Marchetti decision (A. II-112, 113). Marchetti and Marks testified for the plaintiffs, as did Dr. Morton Halperin, petitioners' expert witness, in rebuttal.[14/] After the conclusion of trial, both sides submitted post-trial and reply briefs and oral argument was had. The District Court's decision was rendered on March 29, 1974.

[13/] Much of it was in camera and much of the trial transcript is sealed. Likewise, many of the exhibits are sealed, though petitioners and their attorneys had full access to them.

[14/] At trial the government assumed the burden of proof on the issue of classification. Petitioners assumed the burden of proof on the issues of public domain and course of employment. On the public domain issue, petitioners submitted documents showing that 74 deleted items had been publicized, either in the public press or in congressional documents. On the course of employment issue, Marchetti and Marks testified that, between them, they had learned of 47 of the deleted items outside their course of employment by the CIA and the Department of State respectively. The district court found that only seven items had been obtained by the petitioners outside the course of their employment though commenting specifically on the petitioners' candor throughout their testimony (A. I-120; App., infra, p. 30a).

The Decision of the District Court

The opinion of the court, after reviewing the history of the action, dealt first with the issue of classification.

Proof of classification, the court noted, was attempted by the government by means of the testimony of four deputy directors of the CIA as to the deletions demanded, - each deputy director testifying in effect that he had read the manuscript and had then made the determination with his staff that a particular deleted item contained classified information (App., infra, p. 21a). The court noted that while the testimony of the deputies was that the determination of the classified nature of information was stated to be based on the witness' personal experience, institutional memory, record review, and personal judgment:

> "No director had himself classified any of the information, nor could he tell in any given instance, when the information had been classified or by whom." App., infra, p. 22a.

Upon analysis of the testimony the court concluded that:

> "Although this is denied by them, the decision as to each item here in question by an individual Deputy Director seems to have been made on an ad hoc basis as he viewed the manuscript, founded on his belief at that time that a particular item contained classifiable information which ought to be classified." (App., infra, p. 23a.)

Based upon this finding the District Court concluded the government had failed to meet its acknowledged burden of proof, and that the deputies' testimony had simply failed to prove classification:

> ". . .[T]here should be, in the Court's view, some evidence that the affirmative action contemplated by the Executive Order was taken, before the end of Marchetti's or Marks' employment, to warrant a finding by the Court of classification. The *ipse dixit* of the Deputy Directors after receipt of a manuscript is not sufficient, and cannot suffice if the first amendment rights of these plaintiffs or others like them are to survive." (App., *infra*, p. 23a.)

Next, the court considered in detail the exhibits 15/ submitted by the government. Its specific findings as to each of the exhibits are set out in Appendix I of the district court opinion (App., *infra*, pp. 32a-48a). On close examination, the court found that the evidence supported the fact of classification as to 26 deletions and 2 partial deletions of the 168 items still in controversy. The Court so found despite the fact that it encountered considerable difficulty in specifically relating those deletions to classified information supposedly contained in the exhibits.16/

15/ The exhibits consisted of 103 documentary items purporting to show that particular deleted items had in fact been classified. All the exhibits were themselves said to be classified and are all sealed. None of the exhibits indicated that any particular deleted item had been classified, and much of the deleted information was not referred to in any exhibit. These exhibits are in the record at A. II-449 *et seq*.

16/ Thus, the court found that certain of the govern ment exhibits evidenced the "fact" of classification, only in that they "can conceivably support classification" (A. I-125) or "conceivably could evidence" the classification of a particular operation (A. I-127) or the like.

It found many of the exhibits "meaningless" (A. I-131), and others proof of "nothing" (A. I-132, 133).[17]

Concluding its decision as to classification, the District Court noted:

> "The result of this may be to release some sensitive information; however the rationale underlying the fixing of classification as the dividing line between what could be revealed and what could not was the assumption that, at the time the determination was made to classify, there had been a weighing of the competing interests of national defense and foreign relations on the one hand and the public's right to know on the other hand. It is not too much for the public and these plaintiffs to expect that such a determination be in fact made as to identifiable information, at an ascertainable time prior to the time of viewing the manuscript, if that determination is to be the basis of denying the otherwise clear freedom to publish. As indicated, except in certain instances, there just is no evidence that this was done." (App., *infra*, p. 25a.)

Turning next to the question of the public domain status of the deleted items the court accepted the government's position that classified information could be published only if such information was placed in the public domain *officially*, App., *infra*, p. 25a.

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[17] One exhibit, not entirely unrepresentative, consisted of two sheets of paper stamped "secret" and, outside of the pre-printed form material, contained virtually nothing but the name of a person who was the subject of several deleted passages in the manuscript (A. II-471, 473).

Acknowledging that that was an admittedly narrow reading of the injunction (A. I-115), it concluded that, under that narrow standard, no items deleted fell within the public domain.18/ It found 7 items to have been learned outside the course of petitioners' employment, and thus publishable (App., infra, p. 30a).

The trial court thus based its findings as to classification, public domain, and course of employment upon all of the materials received in evidence. The findings as to each deletion were the result of a careful study by the court of each item deleted and the materials related thereto, and represented a thorough and, we submit, a conclusive factual record to be considered on appeal.

The Decision of the Court of Appeals

Both sides appealed, and the Court of Appeals granted a motion to expedite oral argument, which was held on June 3, 1974. More than eight months later 19/ (almost a year and one-half since the manuscript

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18/ Recognizing that a reviewing court would perhaps take a broader view, the court considered each of the 74 items claimed by plaintiffs to be so well known to the public that they could be considered as in the public domain. Appendix II to the Court's Opinion, App., infra, pp. 49a-54a, described the Court's findings and the basis thereof as to each item under this less circumscribed test. Under that test, the court would have allowed publication of 14 items in full and of 15 other items in part.

19/ It is noteworthy that the Court of Appeals had required the CIA to make its determination as to what material it believed to be classified within 30 days of submission of material to them because of the First Amendment considerations present in the case. Cf. Freedman v. Maryland, 380 U.S. 51 (1965).

had first been submitted to the CIA pursuant to the District Court's injunction) the Fourth Circuit handed down its decision.[20] It held that the District Court was wrong in allowing publication of any of the deleted items, principally because it had imposed a burden of proof on the government which was "far too stringent" (App., infra, p. 15a). In the course of its 14 pages on burden of proof, the Court's opinion only once acknowledges the existence of the First Amendment to the Constitution. Throughout the entire opinion, the First Amendment is referred to but twice, and then fleetingly.

As to proof of the fact that the deleted items are classified, the Court of Appeals opinion holds essentially that the government's burden of proof is satisfied if an official testifies that the items should have been classified and if those items are "contained in a document bearing a classification stamp." The court thought "it would have been nice" if the government could have produced the officer who actually classified each deleted item, but that, the court asserted, "was a practical impossibility." The opinion then holds that "the presumption of regularity" is an adequate substitute for proof. That presumption states that "courts presume that [public officers] have properly discharged their official duties" (App., infra, p. 11a).

In response to the District Court's finding that many of the government's exhibits were "meaningless" in establishing classification, the Court of Appeals held that it was proper for the government to delete everything from such classified documents except the information which was said to match a deleted item.21/

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[20] In the meantime the book had been published by petitioner Knopf with 168 deletions, since restoration was stayed pending appeal. By the time the Fourth Circuit decided the case, a paperback edition, with the same deletions, had also been published.

As to petitioners' right to show that most deleted items were not even subject to classification under the appropriate Executive Order 22/ -- a claim put forward on constitutional grounds by petitioner Marchetti in both rounds of litigation and rejected by the District Court and the Court of Appeals -- the court below acknowledges that the amended Freedom of Information Act "provides for judicial review of questions of classifiability" and directs such review to be conducted on remand.

On the public domain issue, the Court of Appeals affirmed the standard applied by the District Court. As to the seven items found by the District Court to have been learned by petitioners outside their employment, or which would have been learned afterwards "in any event," the Court of Appeals reversed. Again, the Court of Appeals invented a presumption: that "neither [petitioner] should be heard to say that he did not learn of information during the course of his employment if the information was in the Agency and he had access to it." Thus, in face of Rule 52(a), F. Rules Civ. P., the Court of Appeals told the district judge that his personal assessment of credibility was

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21/ The opinion erroneously states that "most" of these documents bear "Top Secret" stamps. Actually, of the 103 exhibits introduced by the government only 22 of them are stamped "Top Secret" (Exhibits 10, 36, 58-65, 66, 67, 69, 73, 82, 83-85, 87, 90, 95). Most of the others are "Secret," and some are "Confidential."

22/ Under the shorthand developed in the course of trial and appeal, this concept has come to be known as "classifiability," and will be so referred to throughout the Petition.

"clearly erroneous," though not stating why.

Finally, the Court of Appeals again considered the First Amendment challenge to the injunction and secrecy agreement and rejected it preemptorily (App., infra, p. 15a).

REASONS FOR GRANTING THE WRIT

This case has two dubious distinctions. It is the first in the nation's history which involves an author who is perpetually required by court injunction to submit his books and articles to a federal agency for censorship before submitting them for publication. And it is the first in the nation's history which involves a book and a publisher which have been officially censored by the United States under the authority of an injunction.

I

THE PRIOR RESTRAINT OF TWO AUTHORS AND THEIR PUBLISHER BY THE INJUNCTION ENTERED IN THIS CASE VIOLATES THE FIRST AMENDMENT.

By the terms of the injunction as modified by the opinion of the Court of Appeals in United States v. Marchetti, petitioner Marchetti must submit to the Central Intelligence Agency all writings, fiction or non-fiction, which "relate to or purport to relate to the Central Intelligence Agency, intelligence or intelligence activities, or intelligence sources or methods," before release to any other individual or corporation. The CIA is authorized within thirty days to withhold approval of "information which is classified and which has not been placed in the public domain by prior disclosure." Publication or disclosure by the defendant of any material so designated by the CIA is a contempt. Since the injunction forbids Marchetti from disclosing "in any manner" classified information not in the public domain, he is also subject to a contempt prosecution for any spoken disclosure of such information if the CIA asserts it is classified.

Certiorari should be granted because this injunction is in direct conflict with the First Amendment and this Court's decision in New York Times v. United States, 403 U.S. 713 (1971), imposing as it does a prior restraint upon Marchetti without the United States having been required to prove that disclosure of the information sought to be restrained would "surely result in direct, immediate and irreparable injury to the Nation or its people." 403 U.S. at 730 (Stewart, J., concurring). The Court of Appeals, ignoring this Court's holding that "the Government '. . . carries a heavy burden of showing justification for the imposition of such a [prior] restraint,'" 403 U.S. at 714, adopted an entirely different standard. Under its standard, the only "burden" on the United States in this case is to show that information is classified.23/ If so, it may prohibit its publication. That, we suggest, is no burden at all, for the instinct of government officers to classify indiscriminately is notorious.24/

Despite the difference in holdings, the only difference between the facts in New York Times v. United

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23/ Indeed, even that standard has been vitiated by the Court's holding that an item to be censored need only be classifiable and contained in some document stamped with a classification stamp, whether or not such stamping was related to the item in question or not.

24/ See Gravel v. United States, 408 U.S. 606, 642 n.9 (1972) (Douglas, J., dissenting).

States and the facts in this case is the existence of Marchetti's 1955 secrecy agreement. The central question, therefore, is whether that agreement by itself can overcome the "presumptive unconstitutionality" of prior restraints. See, e.g., Organization For A Better Austin v. Keefe, 402 U.S. 415 (1971); Pittsburgh Press v. Human Relations Comm., 413 U.S. 376, 396 (Burger, C.J., dissenting) (1973). We believe it cannot.

If government employees "are not relegated to a watered down version of constitutional rights," Garrity v. New Jersey, 385 U.S. 493, 500 (1967); see also Pickering v. Board of Education, 391 U.S. 563 (1968); Epperson v. Arkansas, 393 U.S. 97, 107 (1968), how does Marchetti's right to publish become so much weaker than that of the New York Times and The Washington Post? The only answer supplied by the Court of Appeals is that Marchetti was "contractually bound to respect" the 1955 secrecy agreement (App., infra, p. 60). But given the decision in New York Times and the Constitution's abhorrence of prior restraints, this Court must confront the settled principle (ignored by the court below) that the government may not enforce contract provisions which are "barred by some controlling constitutional prohibition." King v. Smith, 392 U.S. 309, 333 n.34 (1968). While private parties may agree by contract to waive their rights under the Constitution, when the government is a party to an agreement such waivers are unenforceable if they involve fundamental rights of free speech, e.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967); Pickering v. Board of Education, 391 U.S. 563 (1968), or the right to equal protection or due process of law, e.g., Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kramer, 334 U.S. 1 (1948). See also Escalera v. New York City Housing Authority, 425 F.2d 853 (2nd Cir. 1970). Consequently, no matter what the terms of a so-called secrecy agreement, the First Amendment prohibits it enforcement through the device of a prior restraint.25/

The development of this case through its nearly three years of litigation - with its continued extended delays, each of which violated the First Amendment - amply demonstrates the wisdom of and provides the factual underpinning for the "presumptive unconstitutionality" of the injunction issued in this case.

This lawsuit began with CIA asserting that 339 portions of the manuscript could not be published. As the trial date drew closer, the CIA withdrew from scores of the deletions they had previously ordered, until by the morning of the trial (six months after the submission of the manuscript), 168 rather than 339 deletions were at issue. Mr. Colby, when asked about the decision to cut down the number of deletions, testified as follows:

> The basis of it was that while they were technically classified -- and I still think they are -- they are not such that if you want to win this case, which we would like to win for the importance it has for the future of intelligence business in our country -- We don't want to object to things which really aren't that important, even though they are technically classified. (A. II-1129-30; emphasis added)

25/ The sweep of the Court of Appeals perspective on the issue in this case is demonstrated by its statement that "the law would probably imply a secrecy agreement had there been no formally expressed agreement. . ." (App., *infra*, p. 67a). Thus the secrecy agreement in this case is, according to the Court of Appeals, merely a happy coincidence rather than the controlling feature of the case.

The action of the CIA in initially barring publication of "things which really aren't that important" is ample evidence that that which was presumptively unconstitutional should not be deemed constitutional on the basis of meeting the tests set forth in the outstanding injunction. Our point is not only that the CIA has acted capriciously -- although, of course, it has -- it is also that such capricious acts demonstrate the presumptive unconstitutionality of the injunction. Put simply, the power to censor leads inexorably to the overexercise of such power.

The injunction against Mr. Marchetti is a perpetual burden which requires him, on threat of contempt, to submit to the CIA anything he writes which relates to "intelligence," no matter how remotely. As the first such injunction in the nation's history, it warrants plenary examination by this Court.

Finally, the addition of Knopf as a party vitally affects the manner in which this case must be viewed. Knopf is a publisher and, as such, is entitled to the same rights as any other publisher under the First Amendment. Whatever the limitations on the rights of Marchetti and Marks as a result of "contract", Knopf is surely entitled to the full panoply of First Amendment protections set forth in The Pentagon Papers Case and in all the other First Amendment decisions.

There are three distinctions and three only between this case and The Pentagon Papers Case, as they relate to Knopf's rights. The first is that the Times, unlike Knopf, had in hand the documents it sought to publish before the entry of an injunction against publication; the second is that the government did not raise in The Pentagon Papers Case -- although it perhaps could have -- the existence of "secrecy agreements" with the source or sources of the Times; the third is that the Times published TOP SECRET documents in their original form, as opposed to a manuscript independently created without reference to such documents. The first two of these distinctions do not come close to permitting a completely contrary result in the two cases; the third suggests that, if anything, Knopf's rights should be greater than were those of the _Times_ -- and in any event no less extensive. This issue also warrants plenary reviewed by the Court.

II

CONGRESS HAS NOT AUTHORIZED THE GRANTING OF INJUNCTIVE RELIEF IN CASES SUCH AS THE PRESENT DESPITE EFFORTS OF THE CIA TO PERSUADE IT TO DO SO. THE COURT OF APPEALS ERRED IN HOLDING THAT INJUNCTIVE RELIEF COULD BE GRANTED IN THE ABSENCE OF SUCH STATUTORY AUTHORIZATION.

In his deposition in this action, respondent Colby testified that the CIA was seeking congressional authorization to obtain injunctive relief against former employees with respect to their disclosure of classified information. (A.II-1136) In a letter produced by Mr. Colby and proferred by counsel to the CIA for identification in the District Court, Mr. Colby explicitly conceded that "_there is no existing statutory authority for injunctive relief_" in cases such as the present. The letter stated the following:

> "The continued effectiveness of the United States foreign intelligence collection effect is dependent upon the adequate protection of the intelligence sources and methods involved. In recognition of this, Congress, under Section 102(d)(3) of the National Security Act of 1947, made the Director of Central Intelligence responsible for the protection of intelligence sources and methods from unauthorized disclosure. Unfortunately, _there is no statutory authority to implement this responsibility_.

> In recent time, serious damage to our foreign intelligence effort has resulted from unauthorized disclosures of information related to intelligence sources and methods. The circumstances of these disclosures precluded punitive criminal action.
>
> "In most cases, existing law is ineffective in preventing disclosures of information relating to intelligence sources and methods. Except in cases involving communications intelligence, no criminal action lies against persons disclosing classified information without authorization unless it is furnished to a representative of a foreign power or the disclosure is made with intent to harm the United States or aid a foreign power. It also requires the revelation in open court of confirming or additional information of such a nature that the potential damage to the national security precludes prosecution. Furthermore, prevention of disclosure in order to avoid serious damage to the intelligence collection effort better serves the national interest than punishment after disclosure; however, there is no existing statutory authority for injunctive relief." (emphasis added) (A. I-154-56).

This conceded absence of statutory authority for the relief granted by the courts below is a problem which Mr. Colby has sought -- and is still seeking -- to remedy by appearances before Congress urging such legislation. (Hearings on H. R. 12004 before a Subcomm. of the House Comm. on Government Operations, 93rd Cong., 2d Sess. 363 (1974)) Thus far Congress has not adopted any such legislation.

The absence of legislative action in this area is all the more stark in light of the fact that in one limited and carefully defined area Congress did explicitly grant authority to the executive to apply for injunctive relief similar to that which was granted by the district court. Under 42 U.S.C. Section 2280 the Attorney General is authorized, on the recommendation of the Atomic Energy Commission, to make an application to a United States District Court for an injunction against the threatened disclosure of atomic secrets. This statutory basis for an injunction thus stands as the sole exception to the use only of criminal sanctions for the unauthorized disclosure of national security information.

It is precisely the absence of legislation authorizing prior restraints that was a significant factor in the holding of several members of this Court in The Pentagon Papers Case that the prior restraint there could not stand. See 403 U.S. at 720 (concurring opinion of Mr. Justice Douglas joined in by Mr. Justice Black); id. at 732 (concurring opinion of Mr. Justice White joined in by Mr. Justice Stewart); id. at 743 (concurring opinion of Mr. Justice Marshall).26/ These opinions emphasize, at the very least, the impropriety, under principles of separation of powers, of granting injunctive relief in an area in which any such relief, even if it were authorized by Congress, would be presumptively unconstitutional. The decision of the Court of Appeals is not only contrary to those opinions, but

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26/ See also 403 U.S. at 753-4 (dissenting opinion of Mr. Justice Harlan, joined by Chief Justice Burger and Mr. Justice Blackmun). The first question raised in Mr. Justice Harlan's opinion relates to a question raised in this case - the interrelationship of the cases of In Re Debs, 158 U.S. 564 (1895), relied upon by the Court of Appeals - and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See P. Junger, "Down Memory Lane: the Case of the Pentagon Papers", 23 Case Western Reserve L. Rev. 3 (1971).

to the decision of this Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 79 (1952). Certiorari should be granted to resolve these inconsistencies.

III

THE STANDARDS ESTABLISHED BY THE COURT OF APPEALS TO PROVE THAT DELETED ITEMS ARE CLASSIFIED, ARE ERRONEOUS.

This Court's imposition of a heavy burden of proof on the government to justify a prior restraint, relates not only to the injunction as a whole, but also to construction of its terms. Thus, if there is to be an injunction, its terms must be construed so as to limit as far as possible infringement of First Amendment rights. The opinion of the District Court below did just that on the question of proof of classification; but the Court of Appeals, in setting aside the District Court's findings, prostrated itself before the totem of national security and completely ignored the compelling claims of free speech and free press which are guaranteed by the First Amendment and by decisions of this Court.

Not only did the Court of Appeals fail to apply the standard of proof which is required by this Court's decision in The Pentagon Papers Case, but it so succumbed to the CIA's national security claims that it created a so-called presumption of regularity which flies in the face of unrebutted testimony at trial, and is in fact irrebuttable as formulated by the Court.

Petitioner's expert, Dr. Morton Halperin, testified at trial that there is "a very large amount of information which is classifiable . . . and which is, in fact, not classified." He went on to say that ". . . judgments are made every day by officials of the Government at various levels that information that could be classified, in that it fits under the criteria of the Executive

Order, either should not be classified initially or should be declassified" (A.II-211). Thus, the Court of Appeals' presumption, in addition to flouting First Amendment interests, does not even have a basis in reality. The Court's fundamental error was its belief that "a classifying officer is required to classify a document containing classifiable information. . ." (App., infra, p. 11). That assertion is simply wrong; there is no support for it in the testimony, in any statute or regulation, or in practice.27/

Furthermore, the presumption as formulated is actually irrebuttable because it is apparently designed to deprive the district courts of the opportunity not to believe the testimony of the CIA officials in question. Judge Bryan did not believe the testimony of the CIA officials who testified before him.28/ The new

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27/ The Court of Appeals also assumed incorrectly that the contents of the government's exhibits related to the corresponding deleted items and established that they were in fact classified. But the district judge thought otherwise, except for the 26 items he concluded were classified. As to the others, based on his study of the deleted items in context, and his study of the government's exhibits, he concluded that the presence of some words in the exhibits that had some relation to the words in the deleted items, did not establish the fact of classification. The reason is self-evident upon examination of the government's exhibits.

28/ App., infra, p. 23a. There was overwhelming support in the record for Judge Bryan's determination as to credibility. Compare A.III-101 with A.II-150; see also A.II-89-90; A.II-92-93; A.II-119-120; A.II-132; A.II-182-85.

standard of proof established by the Court of Appeals is such that it can be overcome only by petitioners' showing that the information was not in fact classified. The Court neglects to instruct us how to prove that negative. Presumably, petitioners could call all CIA employees and ask each of them if they classified the particular deleted item. That "would be nice," but far more of "a practical impossibility" than requiring the Agency affirmatively to show with some particularity - and in the manner that courts historically required proof to be adduced - that the item was classified.

This Court should grant certiorari, therefore, in order to decide the issues relating to burden of proof in light of the First Amendment.29/

Finally, petitioners have maintained throughout all stages of the litigation that they are entitled as a constitutional matter to attempt to show that deleted items are not subject to classification under the terms of the appropriate Executive Orders. That claim was rejected by the courts below, although Judge Craven expressed his limited agreement with the claim in his concurring opinion in United States v. Marchetti (App., infra, p. 71a). The Court of Appeals, however, has acknowledged that the 1974 amendments to the Freedom of Information Act,30/ 5 U.S.C. Section 552, which allow "any person," in demanding government information said to be classified, to put the government to the test of

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29/ Also drawn in issue, should certiorari be granted, are the standards applied by the courts below in construing the public domain and course of employment provisions of the injunction.

30/ P.L. 93-502, 88 Stat. 1561.

showing that withheld information is both classifiable and "in fact properly classified." 5 U.S.C. Section 552(b)(1)(A). "The burden is on the agency to sustain its action." 18 U.S.C. Section 552(a)(4)(A).

The opinion below does not address itself to the nature of proof or the extent of the government's statutory burden of proof in establishing classifiability. The question also exists whether either of those standards are variable as between a statutory claim under the Freedom of Information Act and petitioners' claim under the First Amendment. The interests of both justice and judicial economy speak on behalf of review of those issues by this Court upon a grant of certiorari.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

Melvin L. Wulf
John H.F. Shattuck
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016
Attorneys for:
Victor Marchetti and
John Marks

Floyd Abrams
Eugene R. Scheiman
Loretta Preska
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005
Attorneys for:
Alfred A. Knopf, Inc.

March 14, 1975

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 74-1478

Alfred A. Knopf, Inc.,
Victor L. Marchetti,
John D. Marks,

Appellees,

versus

William Colby, as Director of
Central Intelligence of the
United States; and Henry
Kissinger, as Secretary of
State of the United States,

Appellants,

No. 74-1479

Alfred A. Knopf, Inc.,
Victor L. Marchetti,
John D. Marks,

Appellants,

versus

William Colby, as Director of
Central Intelligence of the
United States; and Henry
Kissinger, as Secretary of
State of the United States,

Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued June 3, 1974. Decided February 7, 1975

Before Haynsworth, Chief Judge and Winter and Winter and Craven, Circuit Judges.

HAYNSWORTH, CHIEF JUDGE:

This is a sequel to United States v. Marchetti, 4 Cir. 466 F.2d 1309 in which, because of a secrecy agreement he had executed, we upheld an injunction prohibiting Marchetti's public disclosure of classified information acquired by him during the course of his employment by the Central Intelligence Agency and requiring him to submit any material he intended to publish to that agency for its review in advance of publication.

After our earlier decision, Marchetti, in collaboration with John Marks, a former employee of the State Department who had bound himself not to disclose classified information acquired by him during the course of his employment, prepared the manuscript of a book which the plaintiff, Alfred A. Knopf, Inc. intended to publish. After review in the CIA, a letter was written specifying the deletion of 339 items said to contain classified information. Later, after a conference with Marchetti and his lawyer, the CIA agreed to release 114 of the deletions. Later another 29 deletion items were released and still later another 57, leaving 168 deletion items upon which the CIA stood fast.

This action was filed by Alfred A. Knopf, Inc., Marchetti and Marks in the United States District Court for the Southern District of New York, seeking an order which would permit the publication of the then remaining deletion items. On motion of the defendants, the action was transferred to the Eastern District of Virginia where the Marchetti case had been tried and where it could come before the same judge who had tried Marchetti.

I.

At the trial, the four deputy directors of the CIA were presented as witnesses. Collectively they covered all of the 168 deletion items, each covering certain of them. Each testified, in effect, that the deletion item revealed information which was classified, that the information was classified from the inception of the program or from the time of the witness' first contact with it and was still classified. With respect to most, if not all of the items, however, the witness was unable to say who classified the information, for Executive Order No. 10501[1], in effect in the relevant times, did not require the classifying officer to record his identity, as Executive Order No. 11652[2] now does. Nor were they certain about when a particular matter had been classified except certain of the items with respect to which the witness stated the information had been classified from the beginning or from the time of his first contact with it.

These witnesses were questioned about the manner in which they determined that particular items had been classified. Typically, the response was that the witness read the Marchetti-Marks manuscript, marked passages which he thought revealed classified information and then called upon members of the staff for research assistance. The witness indicated that he wished to be certain of his grounds and to make no mistake. The witness then reviewed classified documents produced by the staff, and, after consultation with staff assistants, made his determination or judgment that particular information was, indeed, classified. There were indications that the witness considered his own recollection, institutional history, reports of staff members and classified documents in deciding whether or not particular information was classified.

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[1] November 10, 1953, 18 Fed. Reg. 7049.

[2] March 10, 1972 as amended April 26, 1973, 38 Fed. Reg. 10245.

The District Judge was persuaded that information, which might be sensitive to our national defense or to our relations with foreign nations, is not classified until a classifying officer makes a conscious determination that the governmental interest in secrecy outweighs a general policy of disclosure and applies a label of "Top Secret" or "Secret" or "Confidential" to the information in question. The testimony of the deputy directors, with its imprecision and the generality of the considerations which they said underlaid their determinations seemed insufficient to persuade him that undisclosed individuals had gone through such conscious processes during the time of Marchetti's employment. It seemed to him that the deputy directors were making *ad hoc* classifications of material after having read the Marchetti-Marks manuscript, though he recognized that the deputy directors denied that they were doing any such thing.

Late in the trial, the United States offered a batch of documents, most of them bearing "Top Secret" stamps and collectively containing information relating to the deletion items. Some of these documents dealt with the actual classificiation of certain information. When a document, for instance, specified that certain information relating to a particular program should be classified as "Top Secret" while other information respecting that program should be classified as "Secret", the Judge accepted the document as showing that someone had gone through the conscious process of deciding whether, and in what degree, particular information should be classified. On this basis the District Judge found that the information embodied in 26 of the 168 items was classified during the time of Marchetti's employment. As to the remainder of the 168 deletion items, however, he found the submitted documents of no persuasive value. He was of that opinion because he had been told that a document properly classified as "Top Secret" may contain some bits of information which are not classifiable at all. His difficulty was compounded by the fact that many of the documents marked "Top Secret" had been reproduced with all of their contents blocked out except for one paragraph, sentence or message relating to a deletion item. He reasoned that only the classifying officer could say what information in a particular document led him to classify the entire document "Top Secret" and that a limited disclosure of something extracted from a document classified as "Top Secret" did not establish classification of that information as "Top Secret" or even as being classified in any degree. Recognizing that the deputy directors, at the very least, had testified that the disclosed information was classifiable, he still was of the view that the testimony and the documents in combination did not prove that the disclosed classifiable information had in fact been classified by the unidentified and possibly unidentifiable classifying officer. Though recognizing that some or much of the disclosed information, revealed in the deletion items, was "sensitive", the District Judge concluded that the United States had not shown that the remaining 142 deletion items had been classified. He left, in short, since reasonableness of classification was proscribed, as we held in Marchetti, appropriate recognition of the first amendment rights of Marchetti and of Marks required strict proof of classification which he found wanting under the standards developed at the trial.

When writing in Marchetti, we did not foresee the problems as they developed in the district court. We had not envisioned any problem of identifying classified information embodied in a document produced from the files of such an agency as the CIA and marked "Top Secret", "Secret" or "Confidential". Of course, a document containing the results of tests of highly secret equipment may contain an incidental reference to the weather on a given day at a designated place in the United States, but we foresaw no particular problem in separating the grain from such chaff. With our strictures against inquiry into the reasonableness of any classification, however, we perhaps misled the District Judge into the imposition upon the United States of an unreasonble and improper burden of proof of classification.

When the earlier case was before us, we had supposed that all information in a classified document in the possession of the CIA, except rather obvious chaff of the sort we have mentioned, should be held to be classified and not subject to disclosure. We were influenced in substantial part by the principle that executive decisions respecting the classifying of information are not subject to judicial review. See, e.g., EPA v. Mink, 410 U.S. 73 (1972). The October 1974 amendments[3] to the

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[3] Pub. l. No. 93-502, 88 Stat. 1561.

Freedom of Information Act introduced new considerations. Title 5, Section 552 (b)(1) of the United States Code has been amended to provide for non-disclosure of matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." Furthermore, a new subsection was introduced into Section 552(a), paragraph (B) of the new subsection now numbered (4) specifically providing for judicial review de novo and specifically providing that the judge "may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." The legislative history makes it clear that the Congress intended to overthrow the result of Mink. See, e.g., Conference Report No. 93-1200, U.S. Code Cong. & Admin. News, 93rd Cong., 2d Sess. 6221 at 6223, 6226. That history also discloses a congressional intention that the judge need not inspect the document in camera or require its production. He may act on the basis of testimony or affidavits but, in appropriate cases, he now has a right by virtue of the statute to require production of the document for his inspection in camera.

Since the Freedom of Information Act as now amended clearly provides for judicial review of questions of classifiability, any citizen now can compel the production of information actually classified if its classification was not authorized by the Executive Order.[4] These plaintiffs should not be denied the right to publish information which any citizen could compel the CIA to produce and, after production, could publish. We thus move to the conclusion that the deletion items should be suppressed only if they are found both to be classified and classifiable under the Executive Order.

We observed in Marchetti that the Congress has required the Director of the CIA to protect intelligence sources and methods from unauthorized disclosure.[5] In keeping with the Congressional directive, Executive Order No. 11652, Classification and Declassification of National Security Information and Material, as amended by Executive Order No. 11714[6] provides in § (1)(A) that information shall be classified "Top Secret" if its disclosure would disrupt "foreign relations vitally affecting the national security," would compromise "vital national defense plans * * * communications intelligence systems," would reveal "sensitive intelligence operations" or disclose "scientific or technological developments vital to national security." Subparagraph B provides that information shall be classified as "Secret" if it reveals "significant military plans or intelligence operations." This would encompass any significant intelligence operations not otherwise classifiable under Subparagraph A as "Top Secret." Subparagraph C requires the classification as "Confidential" of all other information the unauthorized disclosure of which might reasonably be expected to damage the national security.

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[4] § 552(b)(3) was not amended. It exempts matters "specifically exempted from disclosure by statute." The statutory direction to the Director to protect intelligence sources and methods from unauthorized disclosure may be such a statute, but such information is also clearly authorized to be classified by the Executive order. The problems that will arise therefore will be concerned with the application of (b)(1) rather than (b)(3).

[5] 50 U.S.C.A. § 403(d)(3). See Machetti, 466 F.2d 1309 at 1316.

[6] 38 Fed. Reg. 10245.

The author of this opinion has examined some, but not all, of the 142 deletion items. The information in at least some of them does relate to sensitive intelligence operations and to scientific and technological developments useful, if not vital, to national security. Such items would seem clearly to be classifiable under the authorization of the Executive Order; others may relate to intelligence sources or methods, the protection of which Congress has decreed in the National Security Act of 1947[7] and classifiable under the Executive Order.

The statutory requirement is not directed to any procedure. It simply requires protection of intelligence sources and methods against unauthorized disclosure, and provision of such protection may require a variety of activity. One obviously appropriate tool in providing that protection, however, is a system of classification required under a succession of Executive orders. Under the statute and those orders, a classifying officer is required to classify a document containing classifiable information and to determine the degree under the guidelines of the current Executive order. Under Executive Order No. 10501, he performed his duty by affixing the appropriate stamp, "Top Secret", "Secret" or "Confidential."

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[7] 50 U.S.C.A. § 403(d)(3).

There is a presumption of regularity in the performance by a public official of his public duty. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." United States v. Chemical Foundation, Inc., 272 U.S. at 14, 15. That presumption leaves no room for speculation that information which the district court can recognize as proper for top secret classification was not classified at all by the official who placed the "Top Secret" legend on the document. This is so whether or not the document contains or may contain other information which should have been classified in the same degree. Under the prevailing practice of classifying a document in accordance with the most sensitive information it contains, the presumption, in the absence of affirmative proof to the contrary, requires the conclusion that all information within it, required by the Executive Order to be classified, was classified when the legend was affixed to the document, even though the particular bit of relevant information, alone, may be properly classified only in a lower degree than the document's classification. In short, the government was required to show no more than that each deletion item disclosed information which was required to be classified in any degree and which was contained in a document bearing a classification stamp.

The presumption dispenses with another problem which bothered the District Judge, the time of classification. He took the view that the government must show that the document was classified before Marchetti left the service. We are dealing, however with information acquired by Marchetti during his employment by the CIA. It simply cannot be supposed that no one performed the duty of classification until after his employment had terminated.

It would have been nice, of course, if, in each instance, the government could have identified and produced the classifying officer who, from other records or extraordinary memory, could have testified that he classified the document on a certain day and that, in doing so, he consciously intended to classify the relevant item of information. That was a practical impossibility, but, in light of the presumption, unnecessary. The office of the presumption, however, is supported by the testimony of the deputy directors that information was classified from the beginning of the operation to which it relates or from the time the Agency first received it.

Nor was it necessary for the government to disclose to lawyers, judges, court reporters, expert witnesses and others, perhaps, sensitive but irrelevant information in a classified document in order to prove that a particular item of information within it had been classified. It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have. The national interest requires that the government withhold or delete unrelated items of sensitive information, as it did, in the absence of compelling necessity. It is enough, as we have said, that the particular item of information is classifiable and is shown to have been embodied in a classified document. This approach is consistent with the Freedom of Information Act which, as we have noticed, provides the judge only with discretionary authority even to require production of the document for his *in camera* inspection; he may find the information both classified and classifiable on the basis of testimony or affidavits.

It is said, however, that some classifiable information is not classified. Reference is made to disclosure of this country's development of Multiple Independently Targeted Reentry Vehicles and the release of information about North Vietnamese forces operating in South Vietnam, including the identity of units, their strength and the routes they took to reach their operating areas. These disclosures, however, were the result of high level executive decisions that disclosure was in the public interest, to counter popular and congressional pressure for more missiles, in the first instance, and, in the second instance, to bolster domestic support for our own military effort in South Vietnam. They are instances of declassification by official public disclosure. There has been no such disclosure of any of the information with which we are concerned, and there is nothing in the record to suggest that any of this classified information has, otherwise, been officially declassified. In the absence of declassification and of any countervailing evidence, the testimony of the deputy directors and the presumption of regularity compel a finding that information properly classified under the guidelines of the applicable Executive Order and embodied in a document bearing a classification stamp was classified at the time the information first came into the possession of the Agency or Department.

Moreover, if the documents in evidence, the testimony of the deputy directors and the presumptions compel a judicial finding that the material is both classifiable and classified, the plaintiffs are not without an avenue of relief within the Executive Branch. Under § 7 of Executive Order 11,652, the National Security Council was given the responsibility of monitoring the implementation of the Order. To assist the Council, an Interagency Classification Review Committee was created. It is authorized to consider and act upon suggestions and complaint from persons within and without government. Composed of representatives of the Departments of State, Defense, and Justice, the Atomic Energy Commission, the Central Intelligence Agency and the Staff of the Security Council, it would not be expected to serve any parochial interest of a particular agency unless it coincided with the national interest. The members of the Review Committee, far more than any judge, have the background for making classification and declassification decisions. If, therefore, any of the items in dispute are thought to be properly declassifiable now, there appears to be an available administrative remedy which is far more effective than any the judiciary may provide, which can function without threat to the national security and which can act within the Executive's traditional sphere of autonomy.

For such reasons, we conclude that the burden of proof imposed upon the defendants to establish classification was far too stringent and that it is appropriate to vacate the judgment and remand for reconsideration and fresh findings imposing a burden of proof consistent with this opinion and including the additional element of classifiability.

II.

We decline to modify our previous holding that the First Amendment is no bar against an injunction forbidding the disclosure of classifiable information within the guidelines of the Executive Orders when (1) the classified information was acquired, during the course of his employment, by an employee of a United States agency or department in which such information is handled and (2) its disclosure would violate a solemn agreement made by the employee at the commencement of his employment. With respect to such information, by his execution of the secrecy agreement and his entry into the confidential employment relationship, he effectively relinquished his First Amendment rights.

III.

The District Judge properly held that classified information obtained by the CIA or the State Department was not in the public domain unless there had been official disclosure of it. This we strongly intimated in our earlier opinion. Rumors and speculations circulate and sometimes get into print. It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so. The reading public is accustomed to treating reports from uncertain sources as being of uncertain reliability, but it would not be inclined to discredit reports of sensitive information revealed by an official of the United States in a position to know of what he spoke. The problem is highlighted and the appropriateness of the answer we reach emphasized by the fact that Marks, on Fifth Amendment grounds, on five different occasions declined to answer whether he was the undisclosed source of information contained in five magazine articles offered by the plaintiffs to show that the information was in the public domain. A public official in a confidential relationship surely may not leak information in violation of the confidence reposed in him and use the resulting publication as legitimating his own subsequent open and public disclosure of the same information. The same rule must apply though there be no basis for suspicion that one of the plaintiffs was the undisclosed source of the previously published information, for security of all official secrets would break down if speculative and unattributed reports were held to have removed all of their protection from them.

It is true that others may republish previously published material, but such republication by strangers to it lends no additional credence to it. Marchetti and Marks are quite different, for their republication of the material would lend credence to it, and, unlike strangers referring to earlier unattributed reports, they are bound by formal agreements not to disclose such information.

One may imagine situations in which information has been so widely circulated and is so generally believed to be true, that confirmation by one in a position to know would add nothing to its weight. However, appraisals of such situations by the judiciary would present a host of problems and obstalces. It may readily be done by the Inter-agency Classification Review Committee. If a particular item is held by the court to be not in the public domain because not officially disclosed, the Review Committee may still find that it has so far entered the public domain that it should be declassified. As long as it remains classified, however, there should be no further judicial inquiry.

IV.

On the basis of what the District Judge described as "an extreme subjective judgment" he found that seven of the deletion items contained information which was either learned by them outside of their employment or was learned both during their employment and afterwards and would have been learned afterwards "in any event." He concluded that they could publish the information contained in those items.

The agreement, of course, covers only information learned by them during their employment and in consequence of it. It does not cover information gathered by them outside of their employment or after its termination. They may not publish information first received by them during the course of their employment even though they later learned of it by communications which did not place the information in the public domain. In a sense, they may be said to have later learned all of the information contained in articles and other materials offered by them in an attempt to show that certain information was in the public domain, but that is not the kind of knowledge acquisition which places the material beyond the reach of the secrecy agreements. Information later received as a consequence of the indiscretion of overly trusting former associates is in the same category. In short, the individuals bound by the secrecy agreements may not disclose information, still classified, learned by them during their employments regardless of what they may learn or might learn thereafter.

Moreover, neither should be heard to say that he did not learn of information during the course of his employment if the information was in the Agency and he had access to it. At least, a substantial presumption should be raised against him in those circumstances. With whatever apparent sincerity a fallible recollection may be expressed, one in Marchetti's high position in the CIA should be presumed to have been informed of all important items of information to which he had access.

On remand the District Judge should review these general findings in light of this opinion, authorizing disclosure of those items of information only which first came to them unofficially after the termination of their employment.

V.

The judgment is affirmed in part, vacated in part and remanded for such further proceedings as may be necessary in accordance with this opinion.

AFFIRMED IN PART;

VACATED IN PART;

REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 540-73-A

ALFRED A. KNOPF, INC., et al.,

Plaintiffs,

-v.-

WILLIAM COLBY, et al.,

Defendants.

MEMORANDUM OPINION

This action is a sequel to United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), which originated in this Court. Pursuant to the injunction as finally approved in that case, Victor L. Marchetti with his co-author and co-plaintiff, John D. Marks, on August 27, 1973, submitted to the Central Intelligence Agency (CIA) a book they proposed to publish, entitled The CIA and the Cult of Intelligence. Prior to this time Marchetti had entered into a contract with the plaintiff Alfred A. Knopf, Inc., a book publisher, whereby the latter agreed to publish a book to be written by Marchetti concerning the CIA, and Marchetti and Marks then agreed to write jointly such a book.

On September 26, 1973, the plaintiffs were notified that the CIA was specifying 339 deletions that would have to be made in the manuscript before it might be published. This list had been reduced by the agency to 168 by the time of trial.

This action was instituted on October 30, 1973.[1] contesting the deletions on the grounds (1) that the deletions are of material that is not classified information; and (2) that even if classified the information was not obtained by Marchetti and Marks during the course of their employment or was information which by prior disclosure has been placed in the public domain, or both. To preserve the point, plaintiffs also contend, as they did in United States v. Marchetti, supra, that the first amendment provides the primary ground for relief, limited only by the standard in New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (concurring opinion of Stewart, J.).

Joining as plaintiffs were Marchetti, Marks, and the publisher Knopf. Named as defendants were William Colby, Director of the CIA, and Henry Kissinger, Secretary of State. Marks is a former employee of the Department of State, having worked there during the period February 2, 1966 to September 8, 1970. By counterclaim, the United States as defendant-intervenor and the defendant Kissinger sought an injunction against Marks similar in terms to the one outstanding against Marchetti since Marks' employment had involved certain employment agreements. At the beginning of the trial a consent decree was entered providing that Marks would be bound by the ultimate determination in this action as to freedom to publish or restrictions on publication to the same extent as Marchetti and as though he, Marks, were a party to the injunction. The decree further provided for dismissal of the counterclaims.

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[1] The case was originally filed in the Southern District of New York and on November 14, 1973 transferred to the Eastern District of Virginia.

Trial was begun on February 28, 1974, and lasted slightly more than two (2) days. Post-trial briefs were filed, and arguments were heard on March 18, 1974.

CLASSIFICATION

At trial, after the parties introduced the manuscript as their joint exhibit, the defendants proceeded, at the direction of the Court, to undertake their acknowledged burden to show that the deletions contained disclosures of classified information. The did this generally by the testimony of four (4) Deputy Directors of the CIA, each of whose sphere of operation covered areas of information contained in certain of the deletions. Together they covered all the deletions, each testifying that he had read the entire manuscript and then, with his staff, made the determination that a particular deleted item contained classified information. The basis of that determination that it was classified was the witnesses' personal experience, the institutional memory, a review of the records and the witnesses' personal judgment. In each instance the witness testified that Exec. Order No. 11652, 3A C.F.R. 154 (1972), had been followed in making the original determination that information was classified which was subsequently disclosed in the manuscript. While each deletion was not discussed in detail, each of the four Deputy Directors testified in detail as to certain exemplary items from the total list of deletions on which he had made a determination. In addition, these witnesses, for the express limited purpose of showing that the Executive Order guidelines had been followed, testified in certain instances that the revelations could inhibit or preclude the type of national defense intelligence operation being conducted and jeopardize the conduct of our foreign relations. No director had himself classified any of the information, nor could he tell in any given instance, when the information had been classified or by whom.

Each of these witnesses conceded that there were substantial amounts of classifiable but unclassified information within the agency, but contended that in the instance of each deletion the revelation was of classified information which had been in that status during the period of employment of plaintiffs. They also testified that none of the information had been declassified. Cross-examination by the plaintiffs of these witnesses which undertook to delve into the reasonableness or necessity for classification of specific information was objected to on the part of the defendants. These objections were sustained on the ground that the Appeals Court's decision in United States v. Marchetti did not permit "going behind" the fact of classification.

The fact of classification is a more elusive concept than appears at first glance, however. A reading of the Executive Order reveals that it applies to information as well as material, and it is at least theoretically possible, as the plaintiffs' expert Halperin points out, for the affirmative action necessary to effect classification to be accomplished without anything being put to paper. (However given the government's penchant for memos and paperwork this seems unlikely.) Although this is denied by them, the decision as to each item here in question by an individual Deputy Director seems to have been made on an ad hoc basis as he viewed the manuscript, founded on his belief at that time that a particular item contained classifiable information which ought to be classified. No matter how conscientiously such decision was made, there should be, in the Court's view, some evidence that the affirmative action contemplated by the Executive Order was taken, before the end of Marchetti's or Marks' employment, to warrant a finding by the Court of classification. The _ipse_ _dixit_ of the Deputy Directors after receipt of a manuscript is not sufficient, and cannot suffice if the first amendment rights of these plaintiffs or others like them are to survive. If the reasonableness of classification is not to be subjected to judicial review, then adoption of such a standard would leave plaintiffs' first amendment rights unprotected and subject to the whim of the reviewing official.

The documentation purportedly supplying evidence of classification was not forthcoming during the testimony of the Deputy Directors except in a few instances when it was requested by plaintiffs' counsel. It was only after the plaintiffs' expert Halperin testified that his examination of the government documents revealed only 12-13 instances where the documents supported the classification determination that the documents were offered in evidence.[2]

Examination of these documents for support of defendants' position starts with a handicap. Under the agency's method of classification, if any single portion of a page is classified, the whole page is stamped with that classification at the top and bottom of the page. As Director Colby testified (dep. p. 10), while the person who classified the document could tell from reading it what it was on that page that led to the stamp, someone else might not. Moreover if one page of a multi-paged document contains classified information, the whole document is so marked without any indication as to where the particular classified passage is located. Thus it is usually impossible to determine what items of information in a document are in fact classified (see, e.g., DX 1). The government has diminished the evidentiary value of many exhibits even more by excising presumably classifiable passages deemed by it to be irrelevant.

The Court's findings with respect to the documents as they relate to each item are set forth in Appendix I.

It follows that, with the few exceptions noted in Appendix I, the defendants have failed to meet their burden of proving classification. They have failed to prove that the necessary affirmative action was taken by a representative of the agency to effect that status upon the information.

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[2] In fairness to the defendants, it should be pointed out that they do not now contend that the documents, standing alone, would support classification of the information contained in all of the deleted items.

The result of this may be to release some sensitive information; however the rationale underlying the fixing of *classification* as the dividing line between what could be revealed and what could not was the assumption that, at the time the determination was made to classify, there had been a weighing of the competing interests of national defense and foreign relations on the one hand and the public's right to know on the other hand. It is not too much for the public and these plaintiffs to expect that such a determination *be in fact made* as to identifiable information, at an ascertainable time prior to the time of viewing the manuscript, if that determination is to be the basis of denying the otherwise clear freedom to publish. As indicated, except in certain instances, there just is no evidence that this was done.

PUBLIC DOMAIN

The Court accepts the government's position that classified information may be published by the plaintiffs only upon a showing that it has been previously *officially* publicly disclosed. This is admittedly a narrow construction of the injunction, and its appeal may be its ease of application; however, a close reading of the decision of the Court of Appeals convinces the Court that that was what was meant. It does, of course, as plaintiffs argue, put Marks and Marchetti in a position of being unable to write about matters that everyone else can write about. But they are different from "everyone else" because of their former employment and employment agreements. As has been pointed out, having one of them, with his former employment status as an added credential, discuss classified information is quite different from having that information discussed in a newspaper article, magazine story, on the floor of Congress or on a television program by a person with less official credibility. Moreover if the "public domain" requirement may be satisfied by other means there arises the problem of just what, qualitatively and quantitatively, it takes before something can be so denominated. Is an article in The Washington Post by a syndicated columnist sufficient? Does the placing of a New York Times article or series of articles in the Congressional Record add to their credibility? Does it depend upon how the article is phrased and to what extent it purports to quote "authoritative sources"? Is the statement of a Tom Braden on a television program sufficient?

The law is full, of course, of lines that have to be drawn, and it is the traditional function of the courts to do so. Here, however, where seeming authenticity might well be based on repetition of rumor, and no more, it seems an unwise task for this Court to undertake.

The Court rejects, therefore, the congressional hearings, magazine articles, transcript of the television program and newspaper articles introduced as evidence of the information being in the public domain.

Should a reviewing court adopt a less narrow standard of what is in the public domain by reason of prior disclosure than has the district court, the court has reviewed the evidence offered, documentary and live, and makes certain findings based on a broader standard. That standard is information, which while not officially disclosed, may be so known to the public from the media or other sources that it can be considered in the public domain.[3] There are 74 items which plaintiffs contend fit this standard. A reading and consideration of the plaintiffs' evidence regarding each item for which it was offered results in findings set forth in Appendix II.

At the February 25, 1974 pretrial deposition of Marks, he invoked the fifth amendment when asked, in substance, whether he was the source of the media material which he now contends placed the information in the public domain. He ought not to be allowed to give the media the information himself and then claim that it is in the public domain. The only exhibits which can definitely be ascertained from the excerpts from that deposition referred to by the defendants as being involved here are Exhibits 1 (the Stern article), 3 (the Karnow article), 27, 33 and 48 (all articles by Szulc). The Court feels that a sufficient sanction for the refusal to answer is to deny Marks the right to rely on those exhibits as evidence of their contents being in the public domain.

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3. A standard somewhere between these two may be preferable; however this would involve an inquiry into such things as the reliability or authoritativeness of the publication or other disclosing media, its breadth of dissemination and the type of reader or listener that particularly media appeals to or reaches. No evidence was adduced on these subjects and with few exceptions, the Court is not in a position to take judicial notice of them.

COURSE OF EMPLOYMENT

The injunction and the Court of Appeals opinion do not include in their prohibition against disclosure information obtained outside the course of employment of Marks and Marchetti with the State Department and CIA, respectively.

As to certain items, the plaintiffs either concede they contain information learned during the course of their employment or do not contend otherwise.[4]

There are other items where Marks or Marchetti concede that they first learned something about an operation or activity during their employment or heard a rumor concerning a program during their employment, and that thereafter, sometimes with and sometimes without additional information and by "deductive reasoning, educated guess and extrapolation," they were able to piece together the information which they ultimately put in the manuscript and which is now sought to be deleted.

The Court has no problem concluding that this information was acquired during the course of their employment.[5] In this category are Items 3 (second part only), 4, 5, 9, 10, 11, 22, 25 (except the part relating to "guerrilla attacks against mainland China"), 27, 28 (except the part relating to the Shah of Iran), 34, 38, 46, 50, 57, 58, 59, 62, 63, 67, 72, 73, 74, 79, 89, 172, 194, 195, 197, 198, 201, 234 (that part relating to Munich), 236, 292 (except for the amount), 299, 317 (except for the amount), 324, 327, 337, and 338.

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[4] In certain instances Marks and Marchetti chose, rather than reveal the source of their information and in the case of Marks rather than answer a question concerning his source which might tend to incriminate him, to forego their claim that they had learned the information outside the course of their employment. Such action and the resulting preclusion from consideration of that claim, is a sufficient sanction for their refusal.

These items and more are all claimed by the plaintiffs to have been learned outside their employment. As to the above enumerated items the Court has found from their testimony or the lack of it that their claim is not borne out. In some instances they conceded at trial or during deposition that their information totally or incipiently came from their employment. In a few instances no mention was made by them concerning the source, which of course resulted in an adverse ruling, since it is their burden to establish that their source is other than their employment.

In a third category is information which the Court finds was learned by the authors outside their employment. In some of these there was testimony that it was learned both while employed and afterwards and would have been learned afterwards in any event. While this is an extremely subjective judgment, the authors' candor with the Court, as evidenced by their ready concessions concerning information learned wholly and partly while employed, dictates a finding in their favor on these items. The Court finds that Items 29, 245, 254, 301, 302, 338 and 339 are within this third category.

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[5] Certain items are claimed as having been learned by Marchetti outside the course of his employment, certain items by Marks and a few by both. As indicated by their briefs both plaintiffs and defendants have apparently assumed that if information was so learned by either it was outside the proscription of the injunction so long as one did not learn it from the other. Accordingly the Court has also proceeded on this assumption.

DISMISSAL OF KNOPF

One other matter warrants the attention of the Court. The defendants contend that the action should be dismissed as far as the plaintiff Knopf is concerned on the grounds that it has no interest in the manuscript, has no standing and there has been no evidence of any contract between it and the authors. Insofar as the last of these is concerned it is true that there is no such evidence; however it would be manifestly unfair to dismiss Knopf as a plaintiff on that ground. Never was that made an issue prior to or during trial. It was never seriously contended that there was no contract. That contract gives Knopf an interest in the manuscript and in the view of the Court, rights at least co-extensive with those of the authors. The contention that Knopf should be dismissed as a plaintiff on these grounds is rejected.

CONCLUSION

The following 140 items are found not to contain information which has been classified by the agency, and consequently may be included in the manuscript the plaintiffs desire to publish: Items 1, 3, 4, 5, 9, 10, 11, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 31, 34, 41, 42, 43, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 62, 63, 72, 74, 79, 87, 88, 89, 91, 92, 107, 128, 129, 130, 135, 136, 152, 155, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 182, 187, 188, 189, 192, 194, 196, 197, 198, 201, 205, 224, 225, 226, 234, 236, 248, 254, 256, 258, 259, 260, 261, 267, 268, 269, 273, 275, 278, 279, 280, 283, 284, 286, 287, 287a, 288, 290, 291, 292, 295, 296, 297, 298, 299, 300, 301, 302, 304, 306, 307, 308, 312, 313, 317, 319, 320, 321, 322, 323, 324, 325, 327, 328, 329, 331, 332, 333, 334, 335, 336, 337, 338 and 339. In addition, those portions of Items 191 and 195 designated in Appendix I as not classified may also be published.

The following 7 items, whether or not classified, are found to have been learned by Marks and Marchetti other than during their employment and consequently may, for that reason, be included in the manuscript the plaintiffs desire to publish: Items 29, 245, 254, 301, 302, 338 and 339.

No items are found to contain information in the public domain by reason of prior disclosure.

A decree embodying the Conclusion above set forth should be prepared by counsel for the plaintiffs and presented for entry after submission to defendants' counsel for approval as to form.

United States District Judge

Alexandria, Virginia
March 29th, 1974

APPENDIX I

This appendix deals with all 168 items sought to be deleted and the exhibits offered by defendants as relating to them. Of these 168 items, it is found that the information in 26 items, those numbered 25, 38, 67, 73, 86, 124, 126, 127, 148, 149, 170, 171, 172, 173, 174, 175, 176, 177, 178, 190, 204, 208, 209, 240, 245 and 318, has been classified by appropriate agency action. In addition, those portions of Items 191 and 195 referred to herein are classified; the balance of Items 191 and 195 is not.

There are thus 140 items in whole and 2 items in part which have not been shown to be classified by appropriate agency action.

Item 1. Offered in support of this item's classification, as well as Items 3, 4, 5, 9, 10, 11, 34, 292, 317 and 337, is Exhibit 1, a page from certain minutes and a series of messages to and from our ambassador to the country mentioned in the items. What has been left unexcised from the messages indicates only that the amount of aid to that country was mentioned in a message that was marked secret. There is nothing from this exhibit to indicate that the information revealed by these items with regard to the name of the country, the position taken by the CIA with regard to its leader, or the dollar amount of aid is classified information. The minutes, a page of which is attached as part of Exhibit 1, contain the quote which is Item 1 and which also appears in Item 337. Whether this portion of the minutes was classified is impossible to tell. That no selectivity was used in classifying the entire page is obvious from reading paragraph 2(b), for example.

Items 3, 4, 5, 9, 10 and 11. See above discussion of Item 1.

Item 18. Offered in support of this item, as well as Items 19, 20, 28 and 52, is Exhibit 3, consisting of two pages, marked secret, which are absolutely meaningless as evidence that our relationship with the man in question, as revealed by these items, is classified information. One page evidences an "operational clearance" given that man, and the other page is evidently the cover page of a memo with regard to that man. Neither reveals anything. The identity of the alleged agent whose name appears in some of these items is not mentioned in the exhibit.

Items 19 and 20. See discussion of Item 18 above.

Item 21. Offered in support of this item as well as Item 273 are Exhibits 4, 5 and 6, which are apparently a cover sheet of a memorandum and portions of a memorandum. None reveal a conscious affirmative action to classify the information revealed in these items, although the information is of the type to which these documents, marked secret, could conceivably relate.

Item 22. Exhibits 7 and 8 are relied upon in support of defendants' position that the information in this item, as well as Items 28, 205 and 312, is classified. Again they are documents, stamped secret and top secret, which apparently relate to the CIA's relationship with a country and its head. They fall short of evidencing that the relationship itself had been classified.

Items 23 and 24. Exhibit 9, offered as evidence of classification of these items, as well as Items 55, 56 and 280, consists, in addition to its heading, of one paragraph, left unexcised on a page which obviously in its original form contained other paragraphs. It addresses itself to the subject of radio and television propaganda in a country whose head has invited the activity. This document just does not show that the subject matter of this type of propaganda and the radio station involved was consciously classified. All it shows is that a document on which appeared, along with other unknown matters, a reference to the radio station and the propaganda operation, had been marked secret.

Item 25. This document, Exhibit 10, marked top secret at both top and bottom, is apparently the cover sheet, some portions and signature pages, of an agreement between the United States and a foreign country, together with a description of some other agreements and that country. It is offered to support not only this item, but Items 295 and 297. It can conceivably support classification of Item 25, and the Court finds that it does, but not Items 295 and 297.

Items 26 and 27. Exhibit 11, offered on these items, as well as Items 319, 320 and 321, adds little if anything, and the marking of secret on Exhibit 12 does not indicate a conscious determination that the funding, through CIA, of support for the leader of the government involved was classified.

Items 28 and 29. Offered in support of the contention that "special relationships" with certain other countries is classified information were Exhibits 2, 3, 7, 13, 14 and 15. Exhibit 2 is a "request for approval to continue ... Funding operations." (Underlining supplied.) Exhibit 3 is a granting of operating clearance. Exhibit 7 is discussed under Item 22. Exhibits 13 and 14 make reference to a general agreement and a continuing of a program, respectively, with two governments mentioned in Item 29. What is revealed in the unexcised portion of the page represented by Exhibit 15 is insufficient to support a finding that reference to that government as having a special relationship with ours because of a subsidy is revelation of classified information. The exhibits support classification of neither of these items nor of Item 152 for which they are also offered.

Item 31. Exhibit 16 is the document allegedly supportive of this deletion. As excised, the document is meaningless; it cannot evidence the classification of Item 31.

Item 34. See discussion of Item 1.

Items 38, 41, 42 and 43. Exhibits 13 and 17 are offered with reference to Item 38. The former adds little if anything; however the marking of the latter as secret, since that document refers to the initiation of a black radio operation, conceivably could evidence that operation's classification, and the Court finds it does support classification. Exhibit 17 is also offered with reference to Items 41, 42 and 43. It does not support the contention that these items reveal classified information.

Item 46. Exhibits 1, 18 and 19 are purportedly evidence that this information is classified. Exhibit 19 is a copy of a telegram, Exhibit 18 consists of excerpts from minutes of a meeting of the 40 Committee, and Exhibit 1 has been discussed under Item 1. The minutes refer to programs apparently previously authorized and do no more than show that someone in authority concluded that something on those pages of the minutes ought to be classified. Whether the program itself, to the extent revealed in Item 46, was ever determined to be classified, is not shown - at least by these exhibits.

Item 47. What has been said of Item 46 applies to this item. The addition of Exhibit 20 does not change the Court's finding.

Item 48. Exhibits 21 and 22 purportedly refer to this item. Only the latter refers to one of the named magazines. Its inclusion, with other revealed information on a page marked secret, is insufficient to find that the subject of CIA subsidies to the six magazines mentioned is classified information.

Item 49. Exhibit 23 refers to past negotiations for purchase. Whether the subject of purchase was ever determined to be classified information is not revealed by the portion of the page revealed in the exhibit.

Item 50. Exhibit 50 contains the curriculum vitae of the "press magnate" referred to in this item. Its being marked secret does not support the proposition that the CIA's relationship with him is classified information.

Item 51. Whether the publication referred to in this item received subsidies from the CIA and, if so, whether this is classified information is not revealed by the exhibit tendered, Exhibit 24. Again, that exhibit only shows that reference to the publication appeared on a page marked secret.

Item 52. See discussion of Item 18.

Item 53. Exhibit 26, while a discussion of past relationships with the organization discussed, gives no support to the contention that that past relationship was originally or at any time in the past determined to be classified information.

Item 54. What is said about Item 53 and the exhibit offered for it applies also to this item and Exhibit 27.

Items 55 and 56. See discussion of Items 23 and 24.

Items 57, 58, 59, 62 and 63. These all have reference to the CIA's publication of certain papers. Offered in support of their classified character is a letter from a former CIA director in which he states that the original material was classified (Exhibit 28). In the Court's view this rises no higher, in an evidentiary sense, than the testimony of a Deputy Director at trial. Also offered is Exhibit 29, a Project Outline. It adds nothing to the sufficiency of the evidence of classification. Nor does the memorandum regarding the name of the publisher, Exhibit 30.

Items 67, 72, 73 and 74. Exhibits 31 and 32 offered in connection with these items are merely historical background of the programs and do not establish classification of the information. Exhibit 33, however, will suffice as evidence of the conscious classification of the program of training of the foreigners in this country - information revealed in Items 67 and 73.

Item 79. Offered in support of the deletion of this item is Exhibit 2, referred to under

Items 28 and 29. It is insufficient to support a finding that the policy of supporting or having a special relationship with the leader in question is classified information. The document is a request to be allowed to continue funding - and no more.

Item 86. Exhibit 36 will suffice as evidence of a conscious determination to classify the future planned action with regard to this program, although the context in which the printed matter on the two page document appears leaves much to be desired.

Items 87 and 88. The documents offered in connection with these items, Exhibits 37 and 38, do not support the position that either the clandestine communication program or the concealment study were originally or at some later time classified. They are merely status or historical reports appearing on pages which someone has marked secret.

Item 89. Exhibit 39 does not support this classification, nor does Exhibit 100 relating to this item and Item 307. Both are reports of past activities.

Items 91 and 92. Whether the existing contract referred to in Exhibit 41 was ever classified is not shown by this exhibit.

Item 107. The status of the particular corporate name as classified is not supported in any exhibit. That name does not even appear in Exhibit 45 or 46. These exhibits are also offered to support the deletion of Items 128, 129 and 279. They do not.

Items 124, 126 and 127. Exhibit 46, while not mentioning the particular company by name, does evidence a determination to declare these future activities secret - activities which are described in these items, and therefore supports these deletions.

Items 128 and 129. See discussion of Item 107.

Item 130. The revealed portions of the two page document marked Exhibit 47 and the three page document marked Exhibit 101 reveal nothing except occasional references to air activities in the country mentioned in this item. The documents are so thoroughly excised as to be meaningless as evidence.

Items 135 and 136. Exhibit 49 in no way establishes or supports the contention that the existence or disposal of the mentioned laboratory was determined to be classified information.

Items 148 and 149. Exhibit 50 supports the proposition that the attempt to induce the foreign official to work for the CIA was determined, in advance, to be classified information.

Item 152. See discussion under Items 28 and 29.

Item 155. Exhibits 51, 52 and 53 do not support a finding that an original determination was made that bringing in technicians from the two mentioned cities was classified information.

Item 157. Exhibits 54 and 55 do not evidence a determination that research of the type referred to is classified information. No mention is made of drugs in the exhibit and both contemplate further research based on current or past findings.

Item 158. The marking secret on a document relating to establishment of a contract with another firm to carry out a study, as shown in Exhibit 56, does not establish that the original idea of such a study is classified information.

Items 159, 160, 161 and 162. The exhibit offered to justify these deletions, Exhibit 57, is apparently a discussion of a project already set in operation. Whether the project was originally deemed classified is not shown by the exhibit. Items 331 and 332 also refer to the project and Exhibit 89 is offered to show its classification. This last exhibit reveals a portion of one page of minutes of a committee meeting at which the project history and cost were evidently mentioned. It does not evidence classification of the project or its cost.

Items 163, 164 and 166. Exhibit 58 is too sketchy a reference to the information contained in these items to lend support to the proposition that the information was classified. Apparently another government agency had requested the CIA to complete the development of the system. Excised as usual, it adds nothing.

Items 165 and 167. The concept of the aircraft was apparently discussed as early as 1967, as revealed in Exhibit 60. That exhibit does not indicate the project was determined to be classified except that the page on which appears a description of the requirements of the mechanical requirements of the aircraft is stamped secret. Exhibit 59, dated nearly two years later, is not evidence of anything except that the project is continuing.

Items 170, 171, 172, 173, 174, 175, 176, 177 and 178. The plaintiffs do not contend that these items, and Item 301, do not reveal information which was classified. An examination of Exhibit 62, though not Exhibit 61, offered by the defendants in support of their position on these items reveals why. The COMINT activities information referred to in these items is specifically determined to be classified or its distribution limited, all as shown in the exhibits themselves. This specificity is lacking in most of the other defense exhibits.

Item 182. This item reveals information concerning wiretapping of an embassy. Offered to support the position that this is classified information is a completely meaningless document, Exhibit 93, which bears the letterhead of the FBI and on which is typed only the name and address of the embassy and a partial sentence beginning "On June 12, 1969 a confidential informant...." It is stamped secret. It evidences nothing.

Items 187 and 189. Again a document is offered, Exhibit 63, which consists of portions of memoranda in which certain references to intelligence gathering are made, including a report of a particular incident, but the document does not evidence a conscious determination that this type of intelligence gathering was classified. The same exhibit is offered with reference to Items 267, 268, 269, 306 and 325. It is insufficient as to those items as well.

Item 188. The stamping of Exhibit 64 top secret does not effect or evidence a conscious determination to effect a classification of the study which is apparently attached to the exhibit and which probably refers to the same system referred to in this item.

Items 190, 191 and 192. Exhibit 65 is apparently the preliminary damage assessment. It is entirely devoted to that, and its being marked top secret is probably evidence that the damage assessment is classified information. It supports deletion 190 and that part of 191 from the beginning on line 24, page 214, through the word "noted" on line 27. The balance of Item 191 and the whole of 192 should not be deleted.

Items 194, 195, 196, 197 and 198. Exhibits 66, 67, 96 and 98 are offered in connection with these items. With the exception of that part of Exhibit 66 which consists of The Memorandum of Understanding with New Zealand and which supports classification of a portion of Item 195 (beginning on line 11, page 216, with the words "and still less" and ending with line 17 on page 216), the balance of these exhibits, while all stamped secret, do not evidence a determination to make our intelligence relationships with certain friendly countries classified information.

Item 201. Exhibit 68 does not establish classification of the relationship with the CIA and the intelligence service of the mentioned country, nor of the particular incident related in the item.

Item 204. Plaintiffs do not contend this information is not classified. Exhibit 69 supports the fact of classification.

Item 205. Assuming this is an ELINT matter, Exhibit 8 does not establish that, as in the case of Exhibit 62 with reference to COMINT, ELINT matters are classified information.

Items 208 and 209. The same as Item 204.

Items 224 and 225. Exhibits 61 and 90 do not support a finding that our relationship with or payments to either of the two countries involved in these items was ever classified information.

Item 226. Exhibit 70 is a portion of a letter, on CIA letterhead, addressed to the president of the shipping line. The portion revealed makes reference to an agreement of the line and the CIA to cover the employment of a person. This can hardly suffice as evidence that the line was used by the CIA as a cover or that such information was classified.

Item 234. Exhibit 71 is insufficient as evidence that subordinates of CIA being based in the four cities mentioned is classified information.

Item 236. No documentation is offered to support the contention that this item reveals classified information.

Items 240 and 245. The plaintiffs do not contend that these items are not related to classified information. See Exhibits 72 and 73.

Item 248. Exhibit 74 is apparently a portion of a message. That portion tells of approval for the flights mentioned in this item. Stamping the message top secret is not evidence that the original information concerning these flights was classified.

Item 254. Exhibit 75 is apparently an excerpt from a message which makes reference to satellite photography. To say that stamping this document secret is evidence that the information attributed to Kissinger in this item is classified is unwarranted.

Item 256. No specific documentation is offered with reference to this item; however, what was said with reference to Items 194 through 198 is also applicable to this deletion.

Items 258, 259 and 260. These all relate to satellite capabilities. The document submitted, Exhibit 76, is a portion of a memorandum in which it is pointed out that this was discussed by a SIGINT committee. Nothing in the document evidences the classification of the information except the stamp of top secret. Under these circumstances this is insufficient.

Item 261. Exhibit 103 is undoubtedly a message from a person in Panama to the CIA director with regard to intelligence matters. It is incomprehensible to the Court, however, as evidence of the classification of the information in this item.

Items 267, 268 and 269. See discussion of Items 187 and 189.

Item 273. See discussion of Item 21.

Item 275. Exhibit 77 is apparently a contract document for the performance of certain research work and a memorandum requesting an extension and enlargement of a contract. It is not evidence, however, that information of the type described in this item was classified.

Item 278. Exhibit 78 does not evidence classification of information regarding the cover company, high schools vis-a-vis colleges, or for that matter the whole subject of such activity.

Item 279. See discussion of Item 107.

Item 280. See discussion of Items 23 and 24.

Items 283, 284, 286, 287, 287a and 288. Exhibit 79 is an analysis of and comment on the Southern African situation; Exhibit 97 is a message to the CIA pertaining to Rhodesia; and Exhibit 102 is a list of the persons in attendance at a meeting on Southern Africa. All are stamped secret, but none indicate that the subjects purportedly discussed at the meeting as recited in these items was determined to be classified.

Items 290 and 291. Exhibit 80 is a request for clearance from the operations officer. It bears, except for the name of the officer, no discernible relationship to these items.

Item 292. See discussion of Item 1.

Item 295. See discussion of Item 25.

Items 296, 298 and 300. Exhibit 81 is an airgram, reporting that an agreement had been reached with the man mentioned in these items, and an enclosure confirming the terms of that agreement. Stamped confidential, the documents do not reveal, other than by the stamp, that the matter of such negotiations and agreement was ever determined to be classified.

Item 297. See discussion of Item 25.

Item 299. While the first page of Exhibit 82 might establish an intent to classify SIGINT, the application of the exhibit to this item is too tenuous to support its deletion.

Item 301. The same as Items 170 and 171.

Item 302. Exhibit 61, offered in support of this and seven or eight other items, does not establish classification of the information that the names of countries in which this country placed (or, as the exhibit indicates, "proposed" to place) facilities was classified.

Item 304. Exhibit 84, apparently a portion of a telegram, refers to the incident discussed in the manuscript just preceding this item. The document itself does not indicate classification of the manner in which American intelligence learned of the incident, which is what this item discusses.

Item 306. See discussion of Items 187 and 189.

Item 307. See discussion of Item 89.

Item 308. No exhibit is offered relating to this item.

Items 312 and 313. The information revealed by the reference to Iran in these two items cannot be considered classified as a result of or from a reading of Exhibit 8.

Item 317. See discussion of Item 1.

Item 318. Exhibit 99 does, in the body of the transmittal document, indicate a conscious determination to classify the information. The deletion of this item is warranted.

Items 319, 320 and 321. See discussion of Items 26 and 27.

Items 322 and 323. Exhibit 86, containing a small reference only to "third country diplomats" and apparently being principally concerned with Cuba, does not support a finding of classification of this item's reference to the Mexican incident.

Item 324. Exhibits 83, 85 and 61 do not support classification of the information with regard to surveillance missions revealed in this item.

Item 325. See discussion of Items 187 and 189.

Items 327 and 328. Exhibit 87, while apparently discussing the flights mentioned in these items, does not indicate that the flights themselves or the CIA's knowledge, or rather lack of it, concerning the flights was classified information.

Item 329. The panel mentioned in Exhibit 88 and its work is not by that document, even with its stamp of secret, made classified information.

Items 331 and 332. See discussion of Items 159, 160, 161 and 162.

Item 333. The reference to Norway in Exhibits 61 and 90 do not have the effect of classifying nor are they evidence of prior classification information in this item relating to a station there.

Items 334, 335 and 336. Exhibit 91 is a dispatch discussing a meeting relating, apparently, to the move to London and the operation there mentioned in these items. Whether such a move and the operation there is classified information, however, is not established or supported by this document.

Item 337. See discussion of Item 1.

Items 338 and 339. Exhibit 92, referring to the Philippines insofar as Item 339 is concerned, and Exhibit 1, referring to Chile in Item 338, add nothing to the contention that the references to these countries as contained in these items is classified information.

APPENDIX II

For 74 items, plaintiffs offered exhibits to demonstrate that the information contained in the items is in the public domain.

An examination of the exhibits and the items for which they are offered reveals that 14 items would be placed in the public domain under the standard set forth in the opinion, if such a standard were held to apply. They are Items 48, 67, 72, 155, 170, 171, 245, 284, 301, 302, 312, 313, 327 and 338.

Additionally, parts of 15 items, those numbered 3, 19, 21, 25, 28, 29, 46, 57, 79, 152, 172, 234, 273, 287(a) and 290, as delineated in this appendix, would also be considered in the public domain.

As to the 45 other items for which public domain evidence was offered, the Court would not find that they would be placed in the public domain.

Item 1. While a reference is made in plaintiffs' Exhibits 33 and 46 (not in Exhibits 1 and 3) to Dr. Kissinger's view of the matter, the quote which is this item is not revealed.

Items 3, 4, 5, 318, 337 and 338. That part of Item 3 appearing in lines 14 and 15, page 11, is in the public domain as a result of Exhibits 1, 3, 33 and 46. The part of Item 3 in lines 19-22 and Items 4 and 5 are not. These exhibits also put in the public domain Item 338, but not Items 318 or 337.

Excluding Exhibits 1, 3 and 33 from consideration does not alter the finding as to all of these items.

Items 9, 10, 11, 292 and 317. Exhibits 1, 3, 33 and 46 are offered for these items. While the Court finds that the figure of $400,000 would be put in the public domain by these exhibits, except in the case of Item 292, that figure is so entwined with the context of the remainder of Items 9, 10, 11 and 317, that in these items it would be meaningless to leave the figure alone without the remainder; the remainder of these items would not be placed in the public domain by these exhibits.

Exclusion of Exhibits 1, 3 and 33 from consideration results in the figure of $400,000 as well as the remainder of all of these items not being in the public domain, however.

Items 18, 19, 20 and 52. While Exhibits 2 and 3 would put in the public domain the "friendly relationship" and the names of the guests at the party, this relates only to that part of Items 18 and 19 included on lines 19-21, page 42, lines 10-12, page 43 (up to and including the word "contributor") and line 10, page 44. The rest of these items would not be in the public domain. Item 52, for which these exhibits are also offered, would be in the public domain.

Exclusion of Exhibit 3 from consideration, however, eliminates all of these items from the public domain except lines 10-12, page 43, in Item 19.

Items 21 and 273. Exhibits 3 and 36 would put the first sentence (lines 1-6, page 45) of Item 21 and that part of Item 273 ending with the word "party" (line 20 and part of line 21, page 380) in the public domain, but no more of these items.

Exclusion of Exhibit 3 from consideration does not change this except it results in that part of Item 21, line 2, referring to Brandt not being in the public domain.

Item 22. Exhibit 6 does not put this item in the public domain.

Item 25. Exhibits 4 and 7 only place in the public domain the beginning of this item, up to and including the word "China" on line 15, page 47.

Items 26 and 27. Plaintiff Marks indicated he relied on the Pentagon Papers as placing these items in the public domain. Since no portion of these Papers are in evidence, the Court cannot find that these items are in the public domain.

Items 28 and 29. The reference in these items to Brandt, Mobutu and Kenyatta are placed in the public domain by Exhibits 4 and 9. The names of the other leaders of government in Item 28 and the prime minister in Item 29 has not been and will therefore have to be deleted; the balance of these items need not be.

Exhibits 3 (even if considered) and 6 add no more in these items to the public domain.

Item 34. See discussion of Item 1. This item is not in the public domain.

Item 46. The first part of this item, ending on line 24, page 70, with the word

"Allende," has not been placed in the public domain by Exhibit 10 and would not be even if Exhibits 1, 3 and 33 were considered. The rest of the item has been placed in the public domain by Exhibit 10.

Item 48. This item has been placed in the public domain by Exhibits 9, 11, 36 and 39.

Item 53. Heine v. Raus, 399 F.2d 785 (4th Cir. 1968), does not place the information contained in this item in the public domain.

Items 57, 58, 59, 62 and 63. Exhibit 12 was not offered in evidence. While Exhibits 38, 40 and 41 relate to these items, they do not contain the detail of the manuscript and amount to no more than speculation and theory. Except for the second sentence of Item 57, these items have not, by these documents, been put in the public domain.

Items 67, 72, 73 and 74. Exhibit 15 was not offered in evidence, but Exhibits 13, 14 and 42 put Items 67 and 72 in the public domain. They do not so place Items 73 and 74.

Item 79. That part of this item appearing on line 28, page 100, and ending with the word "Mobutu" on line 29, has been placed in the public domain by Exhibit 4. The balance of the item has not.

Items 89 and 307. Exhibit 17 puts neither item in the public domain.

Items 124, 126 and 127. While Exhibit 3 would put the first sentence in Item 124 (lines 14 and 15, page 129) in the public domain, Exhibit 23 does not, and therefore none of these items are in the public domain.

Item 152. The relationship with Taiwan is in the public domain, that with the others mentioned is not.

Item 155. This item is placed in the public domain by Exhibit 4.

Items 170, 171, 172, 299 and 301. Items 170, 171 and 301 and the first sentence (lines 12, 13 and part of 14, page 189) of Item 172 (excluding Cypress) are placed in the public domain by Exhibits 25, 36, 47 and 57. The remainder of Item 172 and Item 299 in its entirety are not.

Items 194, 195, 196, 197 and 198. Exhibit 28 was not offered in evidence. Exhibit 27 (even if considered) makes a reference to British intelligence; Exhibit 36 discusses our relationship with Canada and an agreement with others; and Exhibit 48 (even if considered) discloses close ties and agreements with friendly countries. However these exhibits, even if all were considered, do not put the detailed and specific information contained in these items in the public domain.

Item 234. Except for the reference to Hamburg, the rest of this item has been placed in the public domain by Exhibit 4.

Item 245. This is put in the public domain by Exhibit 29.

Item 248. Exhibit 10, while mentioning the SR-71, does not place this item, specific as it is, in the public domain. While the Court has not examined Jane's All the World's Aircraft, 1965-1966, even assuming that it contains a "complete description" of the SR-71, it would not place this item in the public domain.

Items 258, 259 and 260. While Exhibit 29 discusses a satellite of the type mentioned in these items and the ability to "move" it, the specific incident mentioned in these items is not placed in the public domain by the exhibit.

Items 283, 284, 286, 287, 287(a), 288, 290 and 291. Exhibits 53, 54 and 55 put in the public domain Item 284; lines 19 through 22, page 415 of Item 187(a); and that part of line 4, page 417 ending with the word "Rhodesia" in Item 290. No more of these items, and none of Items 283, 286, 287, 288 and 291, is put in the public domain by these exhibits. Exhibit 58 was not put in evidence.

Items 302, 312 and 313. The Court cannot, as suggested, take judicial notice of the information in these items. They are, however, placed in the public domain by Exhibits 25, 48 and 57.

If Exhibit 48 is not considered, this conclusion is not changed.

Item 327. This item is placed in the public domain by Exhibit 45.

Item 329. While Exhibit 38, page 187n is referred to, no such page can be found on that exhibit, nor any reference to Dr. Land. This item therefore remains outside the public domain.

APPENDIX

Opinion in the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1586

UNITED STATES OF AMERICA,

Appellee,

versus

VICTOR L. MARCHETTI,

Appellant.

Amicus Curiae

ASSOCIATION OF AMERICAN PUBLISHERS, INC.
AUTHORS LEAGUE OF AMERICA, INC.

No. 72-1589

UNITED STATES OF AMERICA,

Appellee,

versus

VICTOR L. MARCHETTI,

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA
ALBERT V. BRYAN, JR., DISTRICT JUDGE

Argued May 31, 1972 Decided September 11, 1972

Haynsworth, *Chief Judge*:

The question for decision is the enforceability of a secrecy agreement exacted by the government, in its capacity as employer, from an employee of the Central Intelligence Agency. Marchetti contends that his First Amendment rights foreclose any prior restraint upon him in carrying out his purpose to write and publish what he pleases about the Agency and its operations. Relying on a secrecy agreement signed by Marchetti when he became an employee of the Agency and on a secrecy oath signed by Marchetti when he resigned from the Agency, the District Court ordered Marchetti to submit to the Agency thirty days in advance of release to any person or corporation, any writing, fictional or non-fictional, relating to the Agency or to intelligence and ordering him not to release any writing relating to the Agency or to intelligence without prior authorization from the Director of Central Intelligence or from his designated representative. Marchetti was also ordered to return any writing or other property of the United States he had acquired while employed by the Agency.

We affirm the substance of the decision below, limiting the order, however to the language of the secrecy agreement Marchetti signed when he joined the Agency. We find the contract constitutional and otherwise reasonable and lawful.

This action was initiated on April 18, 1972, when the United States was granted an ex parte temporary restraining order against Marchetti by the District Court. A hearing was set for April 28, 1972, on the Government's motion for a preliminary injunction. On April 21, 1972, Marchetti moved to have the District Court dissolve the temporary restraining order. After that motion had been denied, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) was sought in this court. After oral argument, this panel denied the request for an interlocutory appeal and for writs of mandamus and prohibition, but directed the United States not to interfere with prospective witnesses for Marchetti. Counsel for Marchetti subsequently sought a postponement until May 14, 1972 of the hearing on the preliminary injunction. In granting this postponement, the District Court ordered the trial on the merits consolidated with the hearing on the motion for the preliminary injunction. The trial, held on May 15, was followed on May 19, 1972 by the District Court's Memorandum Opinion and Order granting the injunction sought by the United States.

Marchetti was an employee of the Central Intelligence Agency from October 3, 1955 until he resigned effective September 5, 1969. The positions he held included the post of Executive Assistant to the Deputy Director. When he joined the Agency, he signed a secrecy agreement promising not to divulge in any way any classified information, intelligence or knowledge, except in the performance of his official duties, unless specifically authorized in writing by the Director or his authorized representative.[1] Marchetti

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[1] The relevant provisions of the agreement are:

"SECRECY AGREEMENT

1. I, Victor L. Marchetti, understand that by virtue of my duties in the Central Intelligence Agency, I may be or have been the recipient of information and intelligence which concerns the present and future security of the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards set by the United States Government. I have read and understand the provisions of the espionage laws, Act of June 25, 1948, as amended, concerning the disclosure of in-

also signed a secrecy oath when he resigned from the Agency in 1969.[2]

After his resignation, Marchetti published a novel, entitled *The Rope Dancer*, concerning an agency called the

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formation relating to the National Defense and I am familiar with the penalties provided for violation thereof.

2. I acknowledge, that I do not now, nor shall I ever possess any right, interest, title or claim, in or to any of the information or intelligence or any method of collecting or handling it, which has come or shall come to my attention by virtue of my connection with the Central Intelligence Agency, but shall always recognize the property right of the United States of America, in and to such matters.

3. I do solemnly swear that I will never divulge, publish or reveal either by word, conduct, or by any other means, any classified information, intelligence or knowledge except in the performance of my official duties and in accordance with the laws of the United States, unless specifically authorized in writing, in each case, by the Director of Central Intelligence or his authorized representatives. * * *"

[2] The relevant provisions of the oath are:

"SECRECY OATH

I, ____________, am about to terminate my association with the Central Intelligence Agency. I realize that, by virtue of my duties with that Agency, I have been the recipient of information and intelligence which concerns the present and future security of the United States of America. I am aware that the unauthorized disclosure of such information is prohibited by the Espionage Laws (18 USC secs. 793 and 794), and by the National Security Act of 1947 which specifically requires the protection of intelligence sources and methods from unauthorized disclosure. Accordingly, I SOLEMNLY SWEAR, WITHOUT MENTAL RESERVATION OR PURPOSE OF EVASION, AND IN THE ABSENCE OF DURESS, AS FOLLOWS:

1. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise, any information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods and operations, and specifically Central Intelligence Agency operations, sources, methods, personnel, fiscal data, or security measures to anyone, including but not limited to, any future governmental or private employer, private citizen, or other Government employee

"National Intelligence Agency." Marchetti has also published an article in the April 3, 1972 issue of the magazine, *The Nation*. Entitled "CIA: The President's Loyal Tool," the article criticized some policies and practices of the Agency. In March, 1972, Marchetti submitted to *Esquire* magazine and to six other publishers an article in which he reports some of his experiences as an agent. According to the United States, this article contains classified information concerning intelligence sources, methods and operations. Marchetti has appeared on television and radio shows and has given interviews to the press. He has submitted to a publishing house an outline of a book he proposes to write about his intelligence experiences.

I

Jurisdiction

Jurisdiction arises from the presence of the United States as a party. 28 U.S.C. § 1345. "The government can sue even if there is no specific authorization. In such cases, however, it must have some interest to be vindicated sufficient to give it standing." C. A. Wright, Federal Courts 68 (2d ed. 1970), ch. 3, § 22. Standing arises from the government's interest in protecting the national security.[3]

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or official without the express written consent of the Director of Central Intelligence or his authorized representative.

* * *

3. I do not have any documents or materials in my possession, classified or unclassified, which are the property of, or in custodial responsibility of the Central Intelligence Agency, having come into my possession as a result of my duties with the Central Intelligence Agency, or otherwise. * * *'

[3] Cf. *In re Debs*, 158 U.S. 564, 584:

"Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any

II

The Freedom of Speech and of the Press are not Absolute

Marchetti claims that the present injunction is barred by the Supreme Court decision in the Pentagon Papers case because the Government has failed to meet the very heavy burden against any system of prior restraints on expression. *New York Times Co.* v. *United States,* 403 U.S. 713, 714.

We readily agree with Marchetti that the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified or officially disclosed, but we are here concerned with secret information touching upon the national defense and the conduct of foreign affairs, acquired by Marchetti while in a position of trust and confidence and contractually bound to respect it.

In order to protect freedom of speech and of the press, the First Amendment has been applied beyond its express terms, which were directed solely to Congress:

> "The first amendment provides that 'Congress shall make no law * * * abridging the freedom * * * of the press,' and there has been common disposition

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proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the mattter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

> to apply the amendment to the Executive and the courts as well. [Citing: Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143-44 (Black, J., concurring), 199 (Reed, J., dissenting) (1951); Watkins v. United States, 354 U.S. 178, 188 (1957); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). *See also* Beauharnais v. Illinois, 343 U.S. 250, 386 (Douglas, J., dissenting) (1952); Reid v. Covert, 354 U.S. 1, 17 (1957).] But the import of the first amendment is as uncertain and undefined in regard to the freedom of the Press as to the other rights and freedoms that it protects, and, indeed, the courts have had far fewer occasions to define the freedom of the Press, than, say, freedom of speech." Henkin, The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U. Pa. L. Rev. 271, 277 (1971).

Nonetheless, "[f]ree speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights." Bridges v. California, 314 U.S. 282 (Frankfurter, J., dissenting).[4] In applying the First Amendment to actions taken by the judicial and executive branches, the Supreme Court has followed a flexible approach. As Mr. Justice Brennan wrote in *Roth* v. *United States,* 354 U.S. 476, 483:

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[4] "Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined. By a doctrinaire overstatement of its scope and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society."

***Bridges* v. *California*, 314 U.S. 252, 293 (Frankfurter, J., dissenting). *See also Near* v. *Minnesota*, 283 U.S. 697, 708, "Liberty of speech, and of the press, is * * * not an absolute right, and the state may punish its abuse."**

> "[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais* v. *Ill.,* 343 U.S. 250, 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."

Threats and bribes are not protected simply because they are written or spoken; extortion is a crime although it is verbal. The Supreme Court has also upheld the Labor Board's attempt to protect employees from spoken coercion by employers. *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 616-619. The "government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near* v. *Minnesota,* 283 U.S. 697, 716. Cf. *Pennsylvania* v. *Nelson,* 350 U.S. 497. This flexible approach toward the executive and judicial branch is warranted not only because they are omitted from the express language of the First Amendment, but also because they lack legislative capacity to establish a pervasive system of censorship. This case itself illustrates the point that the executive and judicial branches proceed on a case by case basis, the executive branch being dependent on the judiciary to restrict unwarranted disclosures.

An earlier case upholding a government request to enjoin publication involved the Valachi papers, written while Valachi was in prison. The United States brought an action to obtain a permanent injunction requiring Maas, the editor of Valachi's manuscript, to comply with a "Memorandum of Understanding" which required the approval of the manuscript by the Department of Justice prior to publication or dissemination. The parties entered this agreement because the Attorney General had promulgated, pursuant to 18 U.S.C. §§4001, 4042, a regulation that no manuscript prepared by a federal prisoner should be approved for publication "if it deals with the life history or the criminal career of the writer." Valachi and his attorney had signed the Memorandum, but Maas had not, signing instead another agreement to which the Department of Justice was not a party. The District Court granted the United States a preliminary injunction which was upheld by the Court of Appeals based on the broad discretion of the District Court in considering preliminary injunctions. *Maas* v. *United States,* D. C. Cir., 371 F.2d 348.

This Court recently granted the government declaratory relief against a newspaper publisher who had published a racially discriminatory advertisement for the rental of a room in a private house, in violation of the 1968 Civil Rights Act. The Court denied the defendant's claim that freedom of the press was being abridged, concluding that the act affected the press only in a commercial context and not in the dissemination of ideas. *United States* v. *Hunter,* 4 Cir., 459 F.2d 205, 211-213.

III

The Government has a Right to Secrecy

Gathering intelligence information and the other activities of the Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed Forces. Const., art. II, § 2. Citizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest.

The Supreme Court recognized the need for secrecy in government in *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 320 where it said that the President

> "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."

A similar view was expressed in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U.S. 103, 111:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."

In another case the government was granted an injunction to enforce an agreement with a private contractor who claimed the right to divulge the details of a torpedo to other potential customers. In *E. W. Bliss Co.* v. *United States,* 248 U.S. 37, 48, the Supreme Court quoted with approval from the opinion of the Second Circuit in that case:

> "'The nature of the services rendered was such that secrecy might almost be implied. It is difficult to imagine a nation giving to one of its citizens contracts to manufacture implements necessary to the national defense and permitting that citizen to disclose the construction of such implement or sell it to another nation. The very nature of the service makes the construction urged by the defendant untenable.'"

Although the First Amendment protects criticism of the government, nothing in the Constitution requires the government to divulge information:

> "From our national beginnings, the Government of the United States has asserted the right to conceal and, therefore, in practical effect not to let the people know. Secrecy governed the deliberations in Philadelphia in 1787. Some need for secrecy was expressly recognized in the Constitution: in providing for publication of a journal of each House of Congress, it excepted 'such parts as may in their judgment require secrecy.' The occasional need for secrecy underlay some of the dispositions of the Constitution: the power to conduct foreign relations was given to the Executive rather than to Congress, and a part in making treaties to the less numerous Senate rather than to the House.

Presidents from Washington to Nixon have asserted 'executive privilege' to withhold information from Congress. And Congresses and congressional committees have recognized the 'right,' the propriety, the need for some executive nondisclosure, even to them: since 1791 Congress, in requesting reports from Executive Departments, has asked the State Department to report only what in the President's judgment was 'not incompatible with the public interest.' Modern Congresses have recognized the Executive's classification system and provided for its enforcement, to some extent by criminal penalties. The Supreme Court, too, has repeatedly recognized the need for some secrecy in executive activities. For its own part, Congress has often claimed the need to conceal: the Senate in particular (especially in executive session), and committees and subcommittees of both Houses, have often maintained secrecy. The courts, too, often insist on the confidentiality of deliberations in the jury room or in judicial chambers. The most confidential proceeding in all of government is probably the conference of the Justices of the Supreme Court." Henkin, The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U. Pa. L. Rev. 271, 273-74 (1971).[5]

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[5] *Cf.* 5 U.S.C. § 552(b)(1) exempting from mandatory disclosure under the Freedom of Information Act "matter specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy * * * ." Executive Order 10501 has established a system of classifying documents as "Top Secret", "Secret" or "Classified" depending on the effect of disclosure on the national defense and the conduct of the nation's affairs.

IV

Secrecy Agreements with Employees Provide a Reasonable Means for Government Agencies to Protect Internal Secrets

Congress has imposed on the Director of Central Intelligence the responsibility for protecting intelligence sources and methods. 50 U.S.C. § 403 (d)(3). In attempting to comply with this duty, the Agency requires its employees as a condition of employment to sign a secrecy agreement, and such agreements are entirely appropriate to a program in implementation of the congressional direction of secrecy. Marchetti, of course, could have refused to sign, but then he would not have been employed, and he would not have been given access to the classified information he may now want to broadcast.

Confidentiality inheres in the situation and the relationship of the parties. Since information highly sensitive to the conduct of foreign affairs and the national defense was involved, the law would probably imply a secrecy agreement had there been no formally expressed agreement, but it certainly lends a high degree of reasonableness to the contract in its protection of classified information from unauthorized disclosure.

Moreover, the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment. One may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted. Some prior restraints in some circumstances are approvable of course. See *Freedman* v. *Maryland,* 380 U.S. 51.

V

Marchetti's Rights

As we have said, however, Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech. The agreement is enforceable only because it is not a violation of those rights. We would decline enforcement of the secrecy oath signed when he left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights.[6]

Thus Marchetti retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain.

Because we are dealing with a prior restraint upon speech, we think that the CIA must act promptly to approve or disapprove any material which may be submitted to it by Marchetti. Undue delay would impair the reasonableness of the restraint, and that reasonableness is to be maintained if the restraint is to be enforced. We should think that, in all events, the maximum period for responding after the submission of material for approval should not exceed thirty days.

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[6] There was no apparent consideration for the secrecy oath, so that it would be, generally, unenforceable on that ground. The oath has the support of the moral force underlying solemn oaths, but it added nothing to the Government's arsenal of legal rights in the context of this proceeding.

Furthermore, since First Amendment rights are involved, we think Marchetti would be entitled to judicial review of any action by the CIA disapproving publication of the material. Some such review would seem essential to the enforcement of the prior restraint imposed upon Marchetti and other former employees. See *Freedman* v. *Maryland,* 380 U.S. 51. Because of the sensitivity of the area and confidentiality of the relationship in which the information was obtained, however, we find no reason to impose the burden of obtaining judicial review upon the CIA. It ought to be on Marchetti.

Indeed, in most instances, there ought to be no practical reason for judicial review since, because of its limited nature, there would be only narrow areas for possible disagreement.

The Constitution in Article II § 2 confers broad powers upon the President in the conduct of relations with foreign states and in the conduct of the national defense. The CIA is one of the executive agencies whose activities are closely related to the conduct of foreign affairs and to the national defense. Its operations, generally, are an executive function beyond the control of the judicial power. If in the conduct of its operations the need for secrecy requires a system of classification of documents and information, the process of classification is part of the executive function beyond the scope of judicial review. See *Oetjen* v. *Central Leather Co.,* 246 U.S. 297; *United States* v. *Belmont,* 301 U.S. 324; *Zemel* v. *Rusk,* 381 U.S. 1.

There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

Information, though classified, may have been publicly disclosed. If it has been, Marchetti should have as much right as anyone else to republish it. Rumor and speculation are not the equivalent of prior disclosure, however, and the presence of that kind of surmise should be no reason for avoidance of restraints upon confirmation from one in a position to know officially.

The issues upon judicial review would seem to be simply whether or not the information was classified and, if so, whether or not, by prior disclosure, it had come into the public domain.

VI

Conclusion

For the stated reasons, our conclusion is that the secrecy agreement executed by Marchetti at the commencement of his employment was not in derogation of Marchetti's constitutional rights. Its provision for submission of material to the CIA for approval prior to publication is enforceable, provided the CIA acts promptly upon such submissions and withholds approval of publication only of information which is classified and which has not been placed in the public domain by prior disclosure.

Generally, therefore, we approve the injunctive order issued by the District Court. The case will be remanded, however, for the purpose of revising the order to limit its reach to classified information and for the conduct of such further proceedings as may be necessary if Marchetti contends that the CIA wrongfully withheld approval of the publication of any information under the standards we have laid down.

Affirmed and remanded.

CRAVEN, *Circuit Judge,* concurring:

I agree that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.,* 246 U.S. 297, 302 (1917).

I concur in the opinion of the court except for the statement that the classification of documents and information by the executive is not subject to judicial review. Because the national security may be involved and because of the expertise of the executive, I would resolve any doubt about the reasonableness of a classification in favor of the government. If the burden were put upon one who assails the classification, and surely it ought to be, much of the difficulty envisioned in the court's opinion would presumably disappear. Indeed, I would not object to a presumption of reasonableness, and a requirement that the assailant demonstrate by clear and convincing evidence that a classification is arbitrary and capricious before it may be invalidated.

But however difficult the adjudication of the reasonableness of a secrecy classification, I cannot subscribe to a flat rule that it may never be attempted. The "right to know" is in a period of gestation. I think that the people will increasingly insist upon knowing what their government is doing and that, because this knowledge is vital to government by the people, the "right to know" will grow. I am not yet ready to foreclose any inquiry into whether or not secrecy classifications are reasonable. To protect those that are does not require that we also protect the frivolous and the absurd.

Other than my doubt about the insulation of a classification system from judicial review, I fully concur in the opinion of the court.

Memorandum Opinion and Order

In the

UNITED STATES DISTRICT COURT

For the Eastern District of Virginia

Alexandria Division

Civil Action No. 179-72-A

United States of America,

Plaintiff,

—v.—

Victor L. Marchetti,

Defendant.

The United States has filed a complaint seeking to enforce specific performance of a contract it made with the defendant. The complaint asks for a permanent injunction against disclosure by the defendant, his agents, servants, or employees, assigns, and all others in concert or participation with him, of information obtained by him while an employee of the Central Intelligence Agency (CIA), all in violation of that contract.

The controlling issue in the case, as set forth in defendant's trial brief (p. 16), is "whether the facts are to be judged according to the First Amendment doctrine or according to the common law of contracts." It is the Court's view that it should be viewed according to the latter.

Upon beginning his employment with the United States, the defendant executed the following two secrecy agreements:

"SECRECY AGREEMENT

23 March 1955
Date

1. I am aware of the fact that the Central Intelligence Agency by reason of the sensitive nature of its work, must observe very strict security measures.

2. I agree to honor the requests of the Central Intelligence Agency relative to my application for employment or rendition of services whether it be accepted or rejected.

3. I agree not to inform anyone that I am being considered for a position in the Central Intelligence Agency, unless specifically authorized by a representative of the Central Intelligence Agency.

4. I agree not to disclose processing procedures I have observed in the Central Intelligence Agency.

5. I agree not to discuss by name or otherwise, any individuals with whom I have talked in the course of my application for employment to the Central Intelligence Agency.

/s/ VICTOR L. MARCHETTI
Signature

/s/ WILLIAM E. GREENIP
Witness"

"SECRECY AGREEMENT

1. I, Victor L. Marchetti, understand that by virtue of my duties in the Central Intelligence Agency, I may be or have been the recipient of information and intelligence which concerns the present and future security of the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards set by the United States Government. I have read and understand the provisions of the espionage laws, Act of June 25, 1948, as amended, concerning the disclosure of information relating to the National Defense and I am familiar with the penalties provided for violation thereof.

2. I acknowledge, that I do not now, nor shall I ever possess any right, interest, title or claim, in or to any of the information or intelligence or any method of collecting or handling it, which has come or shall come to my attention by virtue of my connection with the Central Intelligence Agency, but shall always recognize the property right of the United States of America, in and to such matters.

3. I do solemnly swear that I will never divulge, publish or reveal either by word, conduct, or by any other means, any classified information, intelligence or knowledge except in the performance of my official duties and in accordance with the laws of the United States, unless specifically authorized in writing, in each case, by the Director of Central Intelligence or his authorized representatives.

4. I will at all times comply strictly with the Central Intelligence Agency Security Regulations and appendices thereto, which I have read and understand.

5. I understand that no change in my assignment within the Central Intelligence Agency will relieve me of my obligation under this oath and that the provisions of this oath will remain equally binding on me after the termination of my services with the Central Intelligence Agency.

6. I take this obligation freely, without any mental reservation or purpose of evasion.

IN WITNESS WHEREOF, I have set my hand and seal this 3 day of Oct. 1955.

/s/ VICTOR L. MARCHETTI (Seal)"

When he terminated his employment in 1969, he executed the following document:

"SECRECY OATH

I, ..., am about to terminate my association with the Central Intelligence Agency. I realize that, by virtue of my duties with that Agency, I have been the recipient of information and intelligence which concerns the present and future security of the United States of America. I am aware that the unauthorized disclosure of such information is prohibited by the Espionage Laws (18 USC secs. 793 and 794), and by the National Security Act of 1947 which specifically requires the protection of intelligence sources and methods from unauthorized disclosure. Accordingly, I SOLEMNLY SWEAR, WITHOUT MENTAL RESERVATION OR PURPOSE OF

EVASION, AND IN THE ABSENCE OF DURESS, AS FOLLOWS:

1. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise, any information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods and operations, and specifically Central Intelligence Agency operations, sources, methods, personnel, fiscal data, or security measures to anyone, including but not limited to, any future governmental or private employer, private citizen, or other Government employee or official without the express written consent of the Director of Central Intelligence or his authorized representative.

2. I have been invited to submit in writing any monetary claims which I may have against CIA or the United States Government which may in any way necessitate the disclosure of information described herein. I have been advised that any such claims will receive full legal consideration. In the event, however, that I am not satisfied with the decisions of CIA concerning any present or future claims I may submit, I will not take any other action to obtain satisfaction without prior written notice to CIA, and then only in accordance with such legal and security advice as CIA will promptly furnish me.

3. I do not have any documents or materials in my possession, classified or unclassified, which are the property of, or in custodial responsibility of the Central Intelligence Agency, having come into my possession as a result of my duties with the Central Intelligence Agency, or otherwise.

4. During my exit processing and during my period of employment with the Central Intelligence Agency I have been given an opportunity to report all information about the Agency, its personnel, and its operations which I consider should receive official cognizance. Hence, I am not aware of any information, which it is my duty in the national interest to disclose to the Central Intelligence Agency, nor am I aware of any violations or breaches of security which I have not officially reported, except as set forth on the reverse side of this sheet or on other attachments.

5. I have been advised that in the event I am called upon by the properly constituted authorities to testify or provide information which I am pledged hereby not to disclose, I will notify CIA immediately; I will also advise said authorities of my secrecy commitments to the United States Government and will request that my right or need to testify be established before I am required to do so.

6. I am aware of the provisions and penalties of the Espionage Laws, Act of June 25, 1948 (18 USC secs. 793 and 794) and am fully aware that any violation on my part of certain matters sworn to by me under this oath may subject me to prosecution under the terms of that Act, and that violation of other portions of this oath are subject to appropriate action, including such dissemination of the violation as the circumstances warrant.

I have read and understand the contents of this oath and voluntarily affix my signature hereto with the full knowledge that this oath was executed for the mutual benefit of myself and the United States Government, and that it will be retained in the files of the Central Intelligence Agency for its future use or for reference by me at any time in the future that I may be requested or ordered to testify or disclose any of the matters included within the scope of this oath.

IN WITNESS WHEREOF, I have set my hand and seal this 2 Sep 1969.

/s/ VICTOR L. MARCHETTI (Seal)
Signature"

Subsequent to termination of his employment the defendant authored an article entitled "Twilight of the Spooks." He sent this article to a magazine publisher. Subsequently he visited and submitted the manuscript to six other publishers. With one of these he ultimately signed a contract for its publication and received an advance on royalties. The article has never been submitted to the CIA, nor has consent of its Director or his authorized representative been obtained for the revelations contained in the article.

Specifically the Court finds that at least five of the items mentioned in the Karamessines affidavit and testified to by Karamessines on the stand as appearing in the defendant's article ' Twilight of the Spooks," were classified; and at least three items which were taped for television interviews also fit that category. Attempts were made by the defendant to show that the material was improperly classified; that it was information which was publicly known anyway; and that, contrary to the Karamessines affidavit and testimony, revelations of the type made by the defendant would *not* compromise the security of the United States or endanger its intelligence operations. Objections to these attempts were uniformly sustained by the Court during trial. It was the view of the Court at trial, and still is, that it is not the role of the Court to determine whether material should be classified or whether, even if classified, its revelation is immaterial. Nor should the Court make a determination as to the validity of the CIA's judgment on the compromise *vel non* of this country's security and intelligence operations. By contract the defendant has relegated that decision to the CIA. As pointed out in the testimony of Karamessines, on the subject of whether the information is already public, it is one thing to have unconfirmed report, rumor, suspicion and speculation as the source of such information. It is quite another thing to have such information revealed by a person who bears the credentials of a former CIA employee. Even though the information is incorrect, it in some instances was sufficiently close to the truth to be damaging. But damaging or not, it was information obtained by the defendant as a result of his employment with CIA, and consequently its revelation is restricted.

In the opinion of the Court the contract takes the case out of the scope of the First Amendment; and, to the extent the First Amendment *is* involved, the contract constitutes a waiver of the defendant's rights thereunder. It is these documents that the Court feels distinguish this case from *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), and render it no more than a usual dispute between an employer regarding the revelation of information obtained by that employee during his employment. Consequently, there is no prior restraint and no such heavy burden on the United States to show irreparable damage to the country as was imposed by *New York Times.*

There is no suggestion that the secrecy agreements were the product of any fraud or duress or that the defendant was not fully competent at the time of their execution.

The Court finds that, contrary to the documents' proscriptions, the defendant has divulged and published and revealed, by writing and by word, information relating to the national defense and security and information of that nature relating to intelligent sources, methods and operations, both classified and otherwise, without first obtaining consent of the CIA.

The defendant does not contest that he has made the revelations and admits that at least some of the information in the article he gained as a result of his employment with CIA. Indeed, he trades upon his former connection with the CIA as putting him in a unique position to reform the intelligence gathering community of the United States. He seeks to avoid his contract by arguing that the First Amendment gives him rights which transcend any contractual obligations which might be imposed by the United States, and argues further that the United States cannot be considered a traditional employer but must only operate within the prohibitions of the First Amendment, any contract to the contrary notwithstanding.

Defendant cites no case which holds that the United States may not be viewed as an employer with the same contract rights as any other employer and this Court is unwilling to so hold.

In the Court's view the United States has made its case for specific performance when it shows the contract, a breach thereof, and the inadequacy of monetary damages.

The defendant further contests the jurisdiction of the Court, principally on the ground that there is no specific authority for a Federal Court to award injunctive relief for threatened danger to national security. This argument, however, fails along with the failure of the First Amendment argument. 28 U.S.C. § 1345 clearly gives the District Court original jurisdiction of all civil actions.

A permanent injunction will be issued, identical in terms to the temporary restraining order heretofore entered. It is so ordered, and such an injunction will be entered upon presentation.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
May 19th, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) CIVIL ACTION
) NO. 179-72-A
VICTOR L. MARCHETTI,)
)
Defendant.)

PERMANENT INJUNCTION
AND
FINAL ORDER

This matter having come before the Court on remand from the Court of Appeals for the Fourth Circuit and counsel for defendant having indicated to the Court that defendant did not desire further proceedings in this matter except for the revision of the injunction in accordance with the Opinion and Mandate of the Court of Appeals, it is by the Court this 15th day of March, 1973

ORDERED:

That the operative provisions of the permanent injunction entered by this Court on May 24, 1972 be and they hereby are revised and that the "Ordered" provisions of said permanent injunction shall now provide:

That the defendant, Victor L. Marchetti, his agents, servants, employees and attorneys, and all other persons in active concert or participation with him, and each of them, be, and they hereby are permanently enjoined from further breaching the terms and conditions of the defendant's secrecy agreement, dated March 23, 1955, with the Central Intelligence Agency by disclosing in any manner (1) any classified information relating to intelligence activities, (2) any classified information concerning intelligence sources and methods; Provided, however, that this Injunction shall not apply to any such information, the release of which has been authorized in accordance with the terms and conditions of the aforesaid contract, and Provided, further, that this Injunction shall apply only with respect to classified information obtained by said defendant during the course of his employment under the aforesaid secrecy agreement and which has not been placed in the public domain by prior disclosure by the United States; and it is

FURTHER ORDERED:

That the defendant shall submit to the Central Intelligence Agency, for examination 30 days in advance of release to any person or corporation, any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources and methods, for the purpose of avoiding inadvertant disclosure of classified information contrary to the provisions and conditions of the aforesaid secrecy agreement, and such manuscript, article, essay or other writing shall not be released without prior authorization from the Director of Central Intelligence or his designated representative.

Albert V. Bryan, Jr.
UNITED STATES DISTRICT JUDGE

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MICHAEL RODAK, JR

(Submitted with the Consent of the Parties)

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1164

ALFRED A. KNOPF, INC., VICTOR MARCHETTI, and JOHN D. MARKS,
Petitioners,

v.

WILLIAM COLBY, as Director of Central Intelligence of the United States; and HENRY KISSINGER, as Secretary of State of the United States,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae
234 W. 44th Street
New York, N. Y. 10036

IN THE

Supreme Court of the United States

October Term, 1974

No.

Alfred A. Knopf, *et al.*,

Petitioners,

v.

William Colby, as Director of Central Intelligence of the United States, *et al.*,

Respondents.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of The Authors League

The Authors League of America is the national society of professional writers and dramatists. One of its principal concerns is the preservation of freedom of expression. The Authors League believes that the Injunction which restricts the freedom of expression of petitioning authors and publisher, and the system of censorship imposed by the two decisions of the Court of Appeals constitute one of the most serious threats in modern times to the First Amendment rights of authors, publishers and the public. Because The Authors League believes it is imperative that the Court review the decisions, it respectfully submits this brief *amicus curiae* in support of the petition, with the consent of the parties.

I.

Judicial Enforcement of the Contract is Limited by The First Amendment.

The First Amendment prohibits Congress, the Courts and Executive Agencies from imposing by contract and injunction restraints on freedom of expression that could not be constitutionally imposed by statute or regulation. *Shelly* v. *Kraemer,* 334 U.S. 1, 17 (1948); *Barrows* v. *Jackson,* 346 U.S. 249 (1953). And the Courts cannot nullify the First Amendment's mandate by a doctrine of "waiver". Mr. Marchetti did not "waive" his First Amendment rights to write about the CIA by signing the secrecy agreements. He was as bound to accept these restrictions as he would have been had they been imposed by regulation. Moreover, even if the contract constituted a waiver of those rights, the First Amendment bars courts from enforcing a contract's provisions by an injunction which restricts freedoms guaranteed by the Bill of Rights. *Shelly* v. *Kraemer, supra; Barrows* v. *Jackson, supra.*

Finally, and more important, the First Amendment rights at stake are not solely Petitioner's; and he did not have the power to waive them. As the Court emphasized in *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967), the First Amendment's guarantees "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." (p. 389)

II.

The System of Prior Restraint Imposed by the Injunction Infringes The First Amendment Rights of Authors, Publishers and the Public.

(i) As this Court emphasized, the most effective and repressive form of censorship can evolve under a system which requires authors and publishers to bear heavy expenses and burdens in order to vindicate their First Amendment rights; the threat of those burdens coerces many into self-censorship. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279 (1964); *Time, Inc.* v. *Hill,* 385 U.S. 374, 387 (1967). Few publishers could afford the process of executive and judicial "review" of the manuscript of an unpublished book, imposed by the two decisions of the Court of Appeals. Indeed, it is doubtful that even one as resolute as Knopf could afford the third round which it must endure—if certiorari is denied—before this Court would consider the grave constitutional issues presented at this stage, and ripe for consideration. If the system now erected by the Court of Appeals is left intact, then many books by former government employees and officials will go unpublished—because publishers canot afford to pay the costs required, under the Circuit Court's decisions, to challenge prior censorship by executive agencies. We urge the Court to grant certiorari so that the constitutionality of the contract, injunction and system of judicial "review" imposed by the Court of Appeals can be considered by this Court.

(ii) Infringement of the public's First Amendment right to be informed (and petitioners' rights to publish) are the only practical results of the system of prior censorship established by the injunction and the system of review mandated by the Court of Appeals. The public is entitled to read information and discussion of agencies so vital to its interests as the CIA. The most useful source of information, and criticism, is the writings of former government employees: Presidents Truman, Eisenhower and Johnson; advisers to Presidents; former CIA officials and other public servants. Their books have disclosed CIA activities in connection with the "Bay of Pigs", "uprisings" in Iran or Guatamala or the Congo, and other matters of public interest. Events of the past two years should convince anyone that the public's vital need is not to suppress, but to compel vastly greater disclosure, of information about the operations of such executive agencies. But under the Court of Appeals' decisions, an unconstitutional system of prior censorship would be strengthened and could be extended to these former government employees and officials —at the very moment when events have demonstrated overwhelmingly how dangerous such censorship can be to the true security of the republic.

(iii) The mechanism of prior censorship by contract, injunction and limited judicial review under vague standards (and untenable "presumptions of regularity" by classifying officials) cannot even be justified on "practical" grounds. Obviously, former employees cannot be prevented from disclosing sensitive information to foreign governments by a contractual ban and an injunction. Spies and defectors do not publish books to convey secret information to unfriendly governments. They use other, more private means which cannot be reached by injunctions or judicial review. Moreover, former public officials disseminate information by speech as well as published works; e.g. in statements to individuals, to reporters and authors, to lecture audiences, and to television audiences during interviews. Unless the government obtained broad injunctions against all employees who signed secrecy contracts, and kept them under constant watch, it could not prevent them —by injunction—from orally communicating information such as petitioners proposed to publish in their book. The information would thus be available to foreign governments. The restraint on publication would only limit its effective distribution to the American public.

(iv) Indeed, restricting dissemination of information to the American public is the only practical consequence of the secrecy contract-injunction system of prior censorship. As we noted in our *amicus curiae* brief on the previous petition for certiorari, any ex-employee could avoid this prior censorship by taking himself and the information in his head to another country, and writing and publishing his book there. At least one former CIA agent has since followed that course. NEWSWEEK magazine reports that a

> "onetime spook (who) has gone outside the country to publish his expose. The book is called 'Inside the Company: CIA Diary', and ex-agent Philip Agee avoided all attempts at prior censorship by having it first published in Great Britain [640 pages. *Penguin Books,* London]." (January 27, 1975. p. 28)

Under the Court of Appeals' decisions an author could be enjoined from distributing such a book in the United States. But again, foreign readers and unfriendly governments would have the material; and the only restraint would be on the right of the American public to receive the information. The Court of Appeals in effect confirmed this by ruling that the petitioners were even barred from publishing classified information that had been disclosed to the public by others, because this would lead readers to place more credence in it. Foreign intelligence-gathering agencies are not inhibited by these unrealistic assumptions. And it is clear that censorship for this reason is not intended to protect vital national defense information from disclosure to foreign agents, but rather to protect public officials against public opinion.

We respectfully submit that prior censorship of books and articles written by former government employees is repugnant to the letter and spirit of the First Amendment. The overwhelming accomplishment of this prior censorship is destruction or curtailment of the public's right to know, and consequent fiascos such as the Bay of Pigs or the "destabilization" of a foreign government such as Chile's. This damage to the public's right to be informed, the foundation on which our democratic society depends, far outweighs any limited protection of "security" that might be claimed for prior censorship by contract and injunction.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

Irwin Karp
Attorney for the Authors League
of America, Inc., as Amicus Curiae

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1164

ALFRED A. KNOPF, INC., ET AL., PETITIONERS

v.

WILLIAM COLBY, AS DIRECTOR OF CENTRAL INTELLIGENCE OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 509 F.2d 1362. The opinion of the district court (Pet. App. 19a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1975. The petition for a writ of certiorari was filed on March 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals established a proper standard for proving whether national security information is classified under an Executive Order.

2. Whether petitioners are foreclosed by *United States* v. *Marchetti*, 466 F.2d 1309 (C.A. 4), certiorari denied, 409 U.S. 1063, from relitigating in this suit the determinations there that (a) the injunction issued in that case was not an unconstitutional prior restraint under the First Amendment; and (b) the United States was entitled to judicial enforcement of the agreement to which petitioner Marchetti subscribed when he became employed by the Central Intelligence Agency that he would not divulge classified information gained on duty without prior authorization of the Agency.

3. Whether those determinations were correct.

STATEMENT

1. *The Prior Litigation.*[1] Victor L. Marchetti was employed by the Central Intelligence Agency ("CIA")

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[1] Unless otherwise indicated, the facts in this section are taken from the opinion of the court of appeals in *United States* v. *Marchetti*, 466 F.2d 1309 (C.A. 4), certiorari denied, 409 U.S. 1063.

in various capacities from 1955 to 1969.[2] When Marchetti began work for the Agency he executed an agreement in which he promised never to divulge classified information gained on duty without prior authorization by the Agency.

In early 1972, after Marchetti attempted to publish an article dealing with the CIA without first submitting it to the Agency in breach of this agreement (App. III, p. 257, *et seq.*), the United States brought an action in the United States District Court for the Eastern District of Virginia seeking an injunction to enforce that agreement. Marchetti contended at trial that he had a First Amendment right to disclose classified information in violation of his secrecy agreement and that the United States had no right to judicial enforcement of that agreement. The district court disagreed. It enjoined Marchetti from violating his secrecy agreement through unauthorized disclosure of classified information and, to prevent inadvertent disclosure of classified information in the future, required him thereafter to submit any proposed writing pertaining to the CIA or intelligence to the Agency at least 30 days prior to submission for publication (App. I, p. 16). The court of appeals affirmed, with slight modifications, *United*

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[2] From July 1968 to April 1969, he served as Executive Assistant to the Deputy Director of Central Intelligence, Admiral Rufus Taylor, the second highest officer in the Agency (App. II, p. 325). (App. references are to the Appendices in the court of appeals.) In all of his positions, Marchetti had regular access to classified information, and he often classified documents himself (App. II, pp. 319, 320, 321, 327).

States v. *Marchetti*, 466 F.2d 1309 (C.A. 4), and this Court denied certiorari, 409 U.S. 1063.

2. *The Manuscript.* In August of 1973, Marchetti and co-author John D. Marks submitted a manuscript entitled "The CIA and the Cult of Intelligence" to the Agency for review, in accordance with the injunction (App. I, p. 3). Marks is a former employee of the State Department, where he served as Special Assistant to the Director of Intelligence and Research, the chief intelligence officer of that Department (App. II, pp. 381-383). Like petitioner Marchetti, Marks had been required to, and did, execute secrecy agreements upon commencing service with the State Department (App. II, pp. 893-903).

Upon receipt of the manuscript, CIA officials conducted an extensive review to determine whether any of the information contained therein was classified (App. II, pp. 32-33). Within the 30 days provided by the injunction, the CIA advised counsel for Marchetti and Marks that 339 items of classified information identified in the manuscript should be deleted (App. II, p. 909). Marchetti and Marks, together with Alfred A. Knopf, Inc., their publisher, thereupon filed this action in the United States District Court for the Southern District of New York, seeking restoration of the items ordered deleted by the CIA. The case was subsequently transferred to the Eastern District of Virginia (App. I, p. 52).[3]

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[3] After intervention by the United States and contemporaneously with the filing of defendants' answers, the United States and defendant Kissinger counterclaimed against plain-

3. *Proceedings Below.* At the trial[4] (App. II, pp. 1-445), the federal defendants relied primarily on the testimony of the four Deputy Directors of the CIA. Each of them testified that he knew from personal experience, a review of documents, and his personal knowledge, that the items designated for deletion which came within his jurisdiction comprised information which had been, and was currently, classified (App. I, p. 111). Each Deputy Director also testified that the items in question had been classified during the employments of Marchetti and Marks, before the manuscript had been submitted to the CIA, and had never been declassified (*ibid.*). With respect to exemplary deletions, each Deputy Director further testified that the items designated for deletion contained information set forth in certain classified documents, produced by the government during discovery and introduced into evidence (App. II, pp. 434-435), each of which was stamped either TOP

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tiff Marks seeking an injunction requiring compliance with his secrecy agreements (App. I, pp. 234-259). When plaintiff Marks agreed by stipulation to be bound by the ultimate decision in this action as if he were a party to the original injunction, these counterclaims were dismissed without prejudice. Plaintiffs further agreed that, for determining the course of employment, the time periods covered by both Mr. Marchetti and Mr. Marks would both apply (App. I, p. 106).

[4] As a result of negotiations, the government eliminated a number of deletions (Pet. App. 3a), and the plaintiffs eliminated for literary reasons four items originally included (App. II, p. 410). By the time of trial, the number of deletions had been reduced to 168.

SECRET, SECRET, or CONFIDENTIAL (see *e.g.*, App. II, pp. 77-78).[5]

4. *The Decision Below.* The district court found that 26 of the 168 items designated for deletion contained classified information but that the government had not established that the remaining 142 items contain classified information (Pet. App. 6a). The court found petitioners had acquired seven of the latter items outside of their employment.

While the court recognized the potential sensitivity of the 142 items, it determined that the government had not satisfied its burden of proving that the information therein had in fact been classified. The court noted that the Deputy Directors who testified had not themselves classified the information in question, nor were they aware of who had done the classifying; and that while the documentary evidence submitted by the government (containing the same information as the deletions but masking out extraneous matter) bore classification stamps, it was nevertheless "usually impossible to determine what items of information in a document are in fact classified" (Pet. App. 24a). The district court also found, however, that none of the items designated for deletion was in the public domain because such matters as had appeared in the press or elsewhere were unauthenticated and not officially released (Pet. App. 25a).

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[5] The deleted materials related to actual intelligence operations, scientific and technological developments, and intelligence sources and methods and did not, on their face, relate to criticism of the CIA (Pet. App. 10a).

The court of appeals affirmed the district court's findings that none of the items was in the public domain and that 26 of them had been classified. It vacated the district court's finding that as to the 142 items designated for deletion the government had not proved classification and remanded to the district court for consideration pursuant to a different standard of proof.

The court held that it was sufficient for the government to show, in the absence of proof to the contrary, that "each deletion item disclosed information which was required to be classified in any degree and which was contained in a document bearing a classification stamp" (Pet. App. 11a-12a). The court noted that because the Executive Order in force when the information at issue was classified (E.O. 10501) did not require identification of the classifying officer, it was virtually impossible to supply his mental processes.[6]

The court also held that on remand petitioners could challenge the classifiability (that is, whether the Executive Order authorized classification) as well as the fact of classification of all the information at issue, pursuant to new amendments to the Freedom of Information Act, 5 U.S.C. 552, enacted after the trial. The court declined to reconsider its holding in *United States* v. *Marchetti*, *supra*, that the First Amendment did not bar issuance of the original injunction and that the United States was entitled to judicial enforcement of its secrecy agreements with CIA employees.

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[6] The court also held that in producing documentary evidence, security considerations demanded disclosure of no additional classified material beyond what was in the deletions and that the testimony of the deputy directors that the material disclosed in such documents had been, in fact, classified, was adequate (Pet. App. 12a-13a).

ARGUMENT

1. There is no occasion for this Court to review this case in its present posture. The court of appeals has vacated the district court's finding that the government had failed to meet its burden of proving that 142 items of information were classified and has remanded for the district court to reconsider those findings under a different standard of proof. The court of appeals also remanded for the district court to consider, with respect to all 168 items, whether under the intervening amendments to the Freedom of Information Act the material in issue was classifiable under an Executive Order. Accordingly, the case is likely to be in a quite different posture after the remand proceedings have been completed. At the very least, the facts underlying the broad constitutional issues that petitioners raise will have been sharpened and focused as a result of the proceedings on remand.

2. In any event, the court of appeals applied the correct evidentiary test for determining whether particular information has been classified. The court of appeals held that the government need show only that the information was classifiable pursuant to Executive Order and was contained in a document bearing a classification stamp, and that a deputy director

of CIA confirm that the classified status has continued.

The necessity for satisfying any higher burden of proof, such as would be required by the district court, might involve the courts in delicate and inappropriate judgments about the strategic importance of additional information contained in classified documents and entail judicial examination of sensitive documents in order to ascertain the context in which the information in question appears. This is not an appropriate subject for judicial scrutiny, and certainly is not a reasonable standard for determining whether particular information contained in classified documents is itself classified. Alternatively, the district court's standard would involve an inquiry into the contemporaneous mental impressions of the officer who initially classified the documents as to how the information would have been classified had it been separate from more sensitive information in the same document. This is particularly inappropriate because the Executive Order in force when the documents were classified (No. 10501) did not require identification of the classifying officer.[7]

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[7] Marchetti began his employment with the CIA in 1955. It is therefore not surprising that the Deputy Directors who testified may not have known the precise time when a particular item was first classified, or by whom. They did, however, as the district court acknowledged, testify from personal knowledge and agency records that the material was classified during the employment of Marchetti and Marks, and the documentary evidence submitted by the government was contemporaneous with those periods of employment.

The court of appeals' standard for proof of classification reflects well-settled judicial deference to the Executive Branch of government in the area of intelligence gathering and foreign relations. As this Court stated in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302:

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the proprietary of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

See also *C. & S. Airlines* v. *Waterman Corp.*, 333 U.S. 103. Unquestionably, "[g]athering intelligence information and the other activities of the [Central Intelligence] Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces." *Marchetti*, *supra*, 466 F.2d at 1315.

3. The constitutional issues that petitioners raise —the propriety of enjoining petitioner Marchetti from disclosing classified intelligence information in violation of his secrecy agreement with the CIA and requiring him to submit any writings on the subject of intelligence to that agency for at least 30 days prior to publication—were all resolved against Marchetti in the prior case, *United States* v. *Marchetti*, 466 F.2d 1309 (C.A. 4), certiorari denied, 409 U.S.

1063. Petitioner Marchetti and the other petitioners, who are in privity with him, therefore are foreclosed from relitigating those issues. "[M]atters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel." *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598; see, also, *Lawlor* v. *National Screen Service*, 349 U.S. 322, 326.[8] The present case is not a continuation of the prior litigation, but is a new suit originally brought in a different court. Under settled principles of *res judicata*, petitioners cannot use the present case as a means of relitigating issues that have been put to rest in the earlier proceeding.

4. In any event, there is no more occasion for review of the constitutional issues now than there was when this Court denied certiorari in the prior case. The court of appeals properly rejected the contention that the injunction against publication of classified intelligence information in violation of Marchetti's secrecy agreement with the CIA consti-

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[8] The cases petitioner cites in an attempt to avoid the consequences of the earlier judgment (Pet. 13, n. 12) are inapposite, since they involve single actions that had come to the court of appeals initially in an interlocutory posture, were subsequently finally decided by the district court and court of appeals, and then were reviewed by this Court. *United States* v. *Marchetti*, however, was an entirely independent action in which the lower courts resolved against petitioners all questions regarding the application of the First Amendment to the injunction and the entitlement of the United States to sue.

tutes a forbidden prior restraint in violation of the First Amendment, and that the United States had no right to judicial enforcement of the secrecy agreement.

a. Relying on *New York Times Co.* v. *United States*, 403 U.S. 713, petitioners maintain that they have the same right to publish classified material as the New York Times and the Washington Post and that the prior restraint imposed on them by the injunction can be justified only by showing that the "disclosure of the information sought to be restrained would 'surely result in direct, immediate, and irreparable damage to our Nation or its people' " (Pet. 22, quoting the concurring opinion of Mr. Justice Stewart in *New York Times* v. *United States*, 403 U.S. 713, 730).

New York Times Co. v. *United States*, 403 U.S. 713, is inapposite, however, since in that case the United States sought an injunction barring two newspapers from publishing information which they had obtained from specified classified documents, while the injunction in *United States* v. *Marchetti* was issued against a former employee of the United States who agreed, as a condition of his employment, not to disclose classified information which came into his possession during that employment.[*]

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[*] The injunction in the instant case does not run against Knopf, which has no confidential relationship with the government. Although its attorneys have had access to the classified material for the purpose of this litigation, Knopf has not even seen the classified material in issue because the

Regardless of the reasonableness of the contractual provision and the significant interest of the United States in maintaining the confidentiality of classified documents, petitioners contend that the restrictions which may be imposed on their freedom to publish classified information are no different from those which may be imposed on a newspaper which has no such relationship with the government. While "unreasonable" conditions may not be attached to public employment (*Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606), a public employee may be subjected to greater restraints than ordinary citizens. As the Court observed in an analogous context in *Pickering* v. *Board of Education*, 391 U.S. 563, 568, cited by petitioner (Pet. 23):

> * * * "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents*, *supra*, [385 U.S.] at 605-606. At the same time it cannot be gainsaid that the State has interests as an employer in regu-

---

injunction against Mr. Marchetti, to which Mr. Marks has agreed to be bound, prohibited them from disclosing it. Having never seen the information, Knopf is in a far different position than the New York Times or the Washington Post in *New York Times*, *supra*. Its argument is that its alleged contract with Marchetti and Marks gives it a right to acquire this information which outweighs both the secrecy agreements with the government and the final injunction previously issued. Knopf, however, has no First Amendment right to publish material it does not even possess; its rights are entirely derivative of Marchetti's and Marks'.

> lating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[10]

The Central Intelligence Agency, whose principal function necessarily touches upon the most sensitive and confidential matters bearing on the Executive's conduct of foreign policy, "has interests as an employer" that differ "significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Those interests justify the conditioning of employment on a promise by the employee not to make unauthorized disclosure of classified information which comes into his knowledge and possession during his employment. The government as an employer may enter into agreements requiring its employees to maintain the confidentiality of information they obtain as a result of their official duties and the disclosure of which would compromise the performance of important governmental functions. Cf. *Totten* v. *United States*, 92 U.S. 105; *E. W. Bliss Co.* v. *United States*, 248 U.S. 37, 46. As the court of appeals stated in the earlier *Marchetti* case, 466 F.2d at 1316-1317:

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[10] There are, of course, numerous cases in various contexts reaching a similar conclusion. *See, e.g., Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548; *United Public Workers* v. *Mitchell*, 330 U.S. 75; *Goldwasser* v. *Brown*, 417 F.2d 1169, 1176-1177 (C.A.D.C.), certiorari denied *sub nom. Goldwasser* v. *Seamans*, 397 U.S. 922. Courts have authorized injunctions against publications where important governmental interests were at stake. *Mass* v. *United States*, 371 F.2d 348 (C.A.D.C.); *United States* v. *Hunter*, 459 F.2d 205 (C.A. 4), certiorari denied, 409 U.S. 934; see also *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620; Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. Pa. L. Rev. 271 (1971).

> Confidentiality inheres in the situation and the relationship of the parties. Since information highly sensitive to the conduct of foreign affairs and the national defense was involved, the law would probably imply a secrecy agreement had there been no formally expressed agreement, but it certainly lends a high degree of reasonableness to the contract in its protection of classified information from unauthorized disclosure.
>
> Moreover, the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment. One may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted. Some prior restraints in some circumstances are approvable of course. * * *

b. Petitioners also argue that since Congress has never authorized extraction of the secrecy agreements in this case or suit to enforce them, the district court was without jurisdiction to entertain the original complaint. Like petitioners' First Amendment contentions, this contention was definitively rejected in the prior case.

In any event, petitioners' argument ignores 50 U.S.C. 403(d)(3), which states that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Congress obviously intended that in exercising that responsibility, the Director would prescribe reasonable requirements for protecting intelligence sources and methods from unauthorized disclosure. This authority includes the requirement that prospective employees enter into contracts agreeing not to disclose classified information coming into their possession during employment.

Under 28 U.S.C. 1345, which gives the district courts "original jurisdiction of all civil actions, suits or proceedings commenced by the United States," the district court had jurisdiction to entertain this action for specific enforcement of a contract, entered into under Congressionally derived authority. Of course, "the United States may sue to protect its interests." *Wyandotte Co.* v. *United States*, 389 U.S. 191, 201.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

Robert H. Bork,
Solicitor General.

Irving Jaffe,
Acting Assistant Attorney General.

Irwin Goldbloom,
Deputy Assistant Attorney General.

Morton Hollander,
David J. Anderson,
Attorneys.

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In the

Supreme Court of the United States

October Term 1974

No. 74-1164

Alfred A. Knopf, Inc., Victor L. Marchetti, John D. Marks,
Petitioners,

—v.—

William Colby, as Director of Central Intelligence of the United States, and Henry Kissinger, as Secretary of State of the United States,
Respondents.

PETITIONERS' REPLY BRIEF

Floyd Abrams
Eugene R. Sheiman
Loretta Preska
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005
Attorneys for:
Alfred A. Knopf, Inc.

Melvin L. Wulf
John H. F. Shattuck
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016
Attorneys for:
Victor Marchetti and John Marks

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-1164

ALFRED A. KNOPF, INC., VICTOR L.
MARCHETTI, JOHN D. MARKS,

Petitioners,

v.

WILLIAM COLBY, as Director of
Central Intelligence of the
United States, and HENRY KISSINGER,
as Secretary of State of the United
States,

Respondents.

PETITIONERS' REPLY BRIEF

Three years ago, when the original Marchetti case was before this Court, the brief in opposition submitted on behalf of the United States urged that it was "premature" for the Court to hear the case because Marchetti "has not submitted any material for approval [by the Agency], and the Agency has not declined to approve any material for publication." (p.12). This Court then denied certiorari, three Justices dissenting. Marchetti v. United States, 409 U.S. 1063 (1972). In the interim, Marchetti and his co-author, Marks, wrote "The CIA and the Cult of Intelligence"; the book was submitted to the Agency; the Agency did decline to "approve" significant portions of it; judicial review followed in the District Court and the Court of Appeals; and the position of the respondents -- once again -- is that "there is no occasion for this Court to review this case in its present posture." (p. 8).

The "present posture" of the case may be simply stated. A prior restraint has been in effect against Marchetti since April 18, 1972 and against publication of the entirety of "The CIA and the Cult of Intelligence" since its completion and submission to the Agency in August, 1973. For this Court to decline to hear the case pending still further hearings at the District Court level and still further appeals to the Court of Appeals would eviscerate First Amendment rights already gravely harmed by the very processes of litigation this case has engendered. As this Court recently observed in Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974), "Whichever way we were to decide on the merits, it would be intolerable to leave unanswered under these circumstances, an important question of freedom of the press under the First Amendment." (note 6).

The petition for certiorari was filed in this case on March 15, 1975. On March 18, this Court again reaffirmed a number of propositions of direct relevance to the case. In Southeastern Promotions, Ltd. v. Conrad, 43 U.S. Law Week 4365, the Court reaffirmed the presumptive unconstitutionality of all prior restraints and observed that:

> "We held in Freedman [v. Maryland, 380 U.S. 51 (1965)], and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured." Id. at 4370.

Each of these protections has been denied the petitioners in this case. The burden of instituting these proceedings has rested upon the authors and their publisher, not upon their censor; the burden of proof has been held, under the decision of the Court of Appeals, to rest primarily if not exclusively, upon the censored parties and not their censor; the restraint prior to any judicial review effectively lasted from the submission of the manuscript to the Agency in August 1973 through the decision of the District Court in March 1974; and "prompt final judicial determination" is still, after years of litigation, awaited.

We urge the Court to grant the petition for certiorari.

Respectfully submitted,

Melvin L. Wulf
John H.F. Shattuck
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for:
Victor Marchetti and
John Marks

Floyd Abrams
Eugene R. Scheiman
Loretta Preska
Cahill Gordon &
Reindel
80 Pine Street
New York, New York
10005

Attorneys for:
Alfred A. Knopf,
Inc.

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